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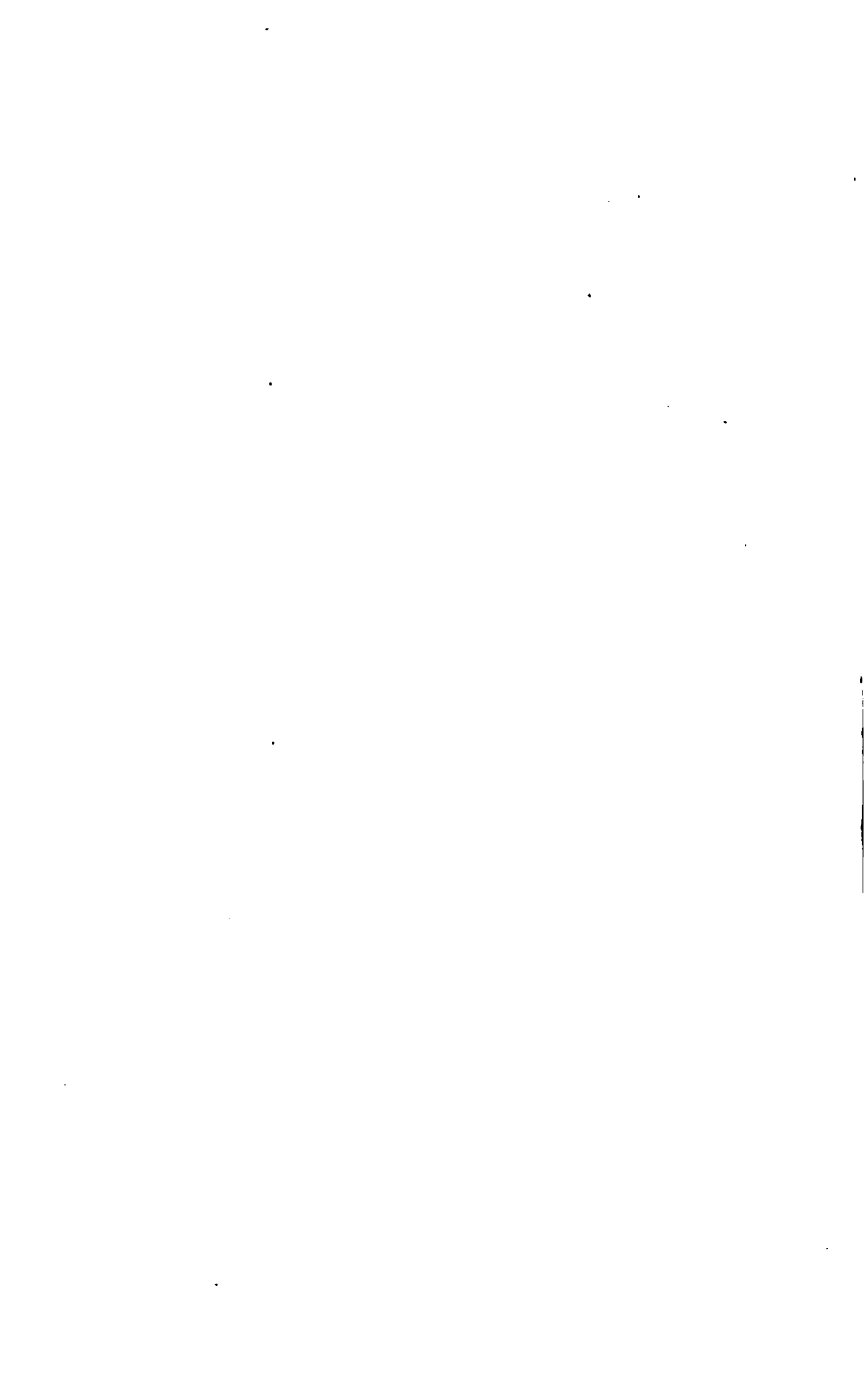
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THE

AMERICAN LAW REGISTER.

NEW SERIES,
VOLUME VII.

(OLD SERIES, VOL. 16.)

FROM NOVEMBER 1867 TO DECEMBER 1868.

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TABLE

OF

LEADING ARTICLES, ETC.

	PAGE
Administration of Justice,	193
Bankrupt Act, Compliment to American Legislation,	330
Bankrupt Act, Constitutionality of the Exemption Clause,	55, 180
Bankruptcy, Jurisdiction of Circuit and District Courts in,	641
Circumstantial Evidence, Conviction upon,	705
Constitutionality of the Concluding Exemption Clause in Bankrupt Act,	55, 180
Crime of Adultery,	769
Dean, Amos,	257
Dowress, Liability for Taxes assessed during Husband's Life,	385
France, Tribunals and Administration of Justice in,	
Interesting Features in Recent English Law,	321
Justice, the Administration of,	193
Law Books, Lists of New, 64, 128, 192, 320, 382, 448, 640, 704, 768	
Liability of Dowress for Taxes assessed during the Hus- band's Life,	385
Material-men and their Liens,	513
Negligence, Liability of Railroad Company for,	449
Patenting a Principle,	129
Railroad Companies, Liabilities of for Negligence,	449
Railway Management and Responsibility,	577

83961.

	PAGE
Recent English Law, Interesting Features in, . . .	321
Tribunals and Administration of Justice in France, . . .	1
Wirt, William,	65

ABSTRACTS OF RECENT DECISIONS.

Maine, Supreme Court,	183, 439
Maryland, Supreme Court,	250
Massachusetts, Supreme Court,	56, 119, 183
Michigan, Supreme Court,	183
New Hampshire, Supreme Court,	250, 311
New Jersey, Court of Chancery,	696, 758
New York, Supreme Court,	56, 119, 183, 250, 311, 376, 507 570, 633, 758
Pennsylvania, Supreme Court,	56, 119, 311
United States, Supreme Court,	56, 119, 311, 376, 439, 570
Vermont, Supreme Court,	183, 570, 633, 696, 758, 829

TABLE OF CASES.

	PAGE		PAGE
Abbe, Matter of	824	City of Richmond, De	
Appold's Estate	624	Voss v.	589
Audenreid v. Randall . .	659	Clinton Bridge, Gray v. .	149
		Coal and Iron Co., Bret-	
Bainbridge v. Sherlock . .	720	taugh v.	109
Baker v. Insurance Co. . .	628	Cole v. Van Riper	478
Ballier v. Common Council .	362	Common Council, Common-	
Balt. and Ohio R. R. Co.,		wealth v.	362
United States v.	757	Commonwealth v. Common	
Bank v. Insurance and Trust		Council	362
Co.	467	Commonwealth, Jett v. . .	260
Barnes v. Hathorn	81	Cook v. Meeker	112
Blackstone v. Buttermore .	108	Curry v. Scott	166
Bloch v. Isham	8		
Books, Penna. R. R. Co. v. .	524	Daily Post Co. v. McArthur	462
Bourcicault v. Wood	539	Davis & Son, Matter of . .	30
Bradshaw v. Klein	505	Dean v. Charlton	564
Brettaugh v. Coal and Iron		Dean, O'Meara v.	229
Co.	109	Detroit, Hobart v.	741
Bruff v. Mali	48	Devoe, Matter of	690
Bunce v. Gallagher	32	De Voss v. City of Richmond	589
Burns, Matter of	105	Dist. Atty., Case of	786
Buttermore, Blackstone v. .	108	Dodge, Matter of	438
Byrne, Matter of	499	Donaldson, Ex parte	213
		Dunbar, Rhodes v.	412
Campbell, Matter of	100		
Carew, Telegraph Co. v. . .	18	Eddy, Howe v.	219
Case of District Attorney .	786	Eldred, Mason v.	402
Charlton, Dean v.	564	Ensworth v. N. Y. Life Ins.	
City of Detroit, Hobart v. .	741	Co.	332

	PAGE		PAGE
Fairchilds, United States v.	306	Kingsley, Matter of . . .	423
Farnham v. Railroad Co. . .	172	Klein, Bradshaw v. . . .	505
Flint, Ford v.	296	Kline v. Kline	713
Ford v. Flint	296	Koenig v. Smith	717
Galena Packet Co. v. Rock		Langley, Perry v. . . .	429
Island R. R. Co.	409	Leeds, Matter of	693
Gallagher, Bunce v. . . .	32	Life Ins. Co. v. Hall . .	606
Garbutt, People v. . . .	554	McArthur, Daily Post Co. v.	462
Gill v. Pavenstedt	672	McClurg, R. R. Co. v. . .	277
Gordon v. Stott	749	McCramer v. Thompson . .	92
Gray v. Clinton Bridge . .	149	McDaniels v. McDaniels . .	729
Greening v. Schooner Grey		McReynolds v. The State . .	736
Eagle	226	Mason v. Eldred	402
Greup, Haycock v.	529	Mead v. Bank	818
Hall, Life Ins. Co. v. . . .	606	Meeker, Cook v.	112
Hansbrough v. Peck	74	Marquardt, Morrison v. . .	336
Hartley & Morris's Appeal .	106	Milner, Matter of	371
Hathorn, Barnes v.	81	Morrison v. Marquardt . .	336
Haycock v. Greup	529	Nat. Bank of Fayetteville,	
Hewison v. New Haven . . .	777	Mead v.	818
Hinde, Railway Co. v. . . .	14	New Haven, Hewison v. . .	777
Hobart v. City of Detroit . .	741	N. Y. Life Ins. Co., Ens-	
Hooker, Phillips v.	40	worth v.	332
Hopkins v. Westcott	533	Oakes v. Spaulding	551
Howe v. Eddy	219	O'Meara v. Dean	229
Huntington v. R. R. Co. . .	143	Patterson, Matter of	26
Hughes, Irving v.	209	Pavenstedt, Gill v. . . .	672
Insurance Co., Baker v. . . .	628	Peck, Hansbrough v. . . .	74
Insurance and Trust Co.,		Penna. R. R. Co. v. Books . .	524
Bank v.	467	People v. Garbutt	554
Irving Bank v. Wetherald . .	352	Perry v. Langley	429
Irving v. Hughes	209	Pettis, Matter of	695
Isham, Bloch v.	8	Phillips v. Hooker	40
Jersey City Window Glass		Phoenix Iron Co., Richards v.	356
Co., Matter of	419	Rags, &c., United States v. .	369
Jett v. Commonwealth . . .	260		
Jewett, Matter of	291, 294		

TABLE OF CASES.

vii

	PAGE		PAGE
Railroad Co., Farnham v.	172	Smith, Koenig v.	717
Railroad Co. v. Hinds	14	Spaulding, Oakes v.	551
Railroad Co., Huntington v.	143	State, McReynolds v.	736
Railroad Co. v. McClurg	277	State of Ohio v. Ritt	88
Railroad Co. v. Rutherford	476	Stott, Gordon v.	749
Randall, Audenreid v.	659		
Ray, Matter of	283	Telegraph Co. v. Carew	18
Rhodes v. Dunbar	412	Thirty-three Barrels, United	
Rhodes, United States v.	233	States v.	365
Richards v. Phoenix Iron Co.	356	Thompson, McCramer v.	92
Richmond, De Voss v.	589	Trevor v. Wood	215
Ritt, State of Ohio v.	88		
Rock Island Railroad Co.,		United States v. Balt. and	
Galena Packet Co. v.	409	O. R. R. Co.	757
Rosenfield, Matter of	618	United States v. Fairchilds	306
Rowse v. Washington Uni-		United States v. Rags, &c.	369
versity	390	United States v. Rhodes	233
Ruth, Matter of	157	United States v. Six Ferment-	
Rutherford, Railroad Co. v.	476	ing Tubs	751
		United States v. 33 Barrels	365
Schnepf, Matter of	204		
Schooner Grey Eagle, Green-		Van Riper, Cole v.	478
ing v.	226		
Scott, Curry v.	166	Wash. University, Rowse v.	390
Shepard, Matter of	484	Wells & Son, Matter of	163
Sherlock, Bainbridge v.	720	Westcott, Hopkins v.	533
Six Fermenting Tubs, United		Wetherald, Irving Bank v.	352
States v.	751	Wood, Bourcicault v.	539
		Wood, Trevor v.	215

ERRATA.

423, line 4 of syllabus, for "*dead*" read "*debt*."
 609, line 25, for "*when*" read "*where*."



THE
AMERICAN LAW REGISTER.

NOVEMBER, 1867.

THE TRIBUNALS AND THE ADMINISTRATION OF JUSTICE IN
THE EMPIRE OF FRANCE.

ONE can scarcely compare the courts in different countries, without the hazard of making unjust or unfounded inferences. And still there is no one thing upon which the real character of free governments, and indeed of all governments, more entirely depends. But there is very much in the mere organization of the courts or judicial tribunals of the French Empire, to indicate the energy and decision with which the government is administered. It is a perfect system of superiority and subordination, from the humblest police magistrate to the High Court of Cassation.

In a few days' visit to the Palace of Justice, although accompanied by a very intelligent advocate, who was entirely competent and very ready to explain all which came under review, one could scarcely expect to acquire very accurate information in regard to the detail of so complex a system as that of the judicial tribunals of a great empire, like that of the French. But some of the more important points of difference between our own and the jurisprudence of the French, and the comparison which each bears to that of England, may be briefly noted.

The procedure in France, as in most of the Continental countries, is according to the principles and practice of the Roman civil law. In the trial of civil actions of every grade no jury is allowed, the judge deciding everything according to his own sense

of justice and propriety. And, as would naturally be expected, where every thing depends upon the arbitrary discretion of the judge, testimony of almost every grade of conclusiveness, or the contrary, is received, and it often happens that the case is finally made to turn upon very slight circumstances, and is really decided upon evidence, in itself, of no great significance, and which, upon the more exact and refined rules of the English common law, would scarcely be considered competent. But this is a result not very different from that which often occurs in jury trials at common law, where causes are made to turn, quite as often, perhaps, upon the bias of the jury, religious or political, or the last words of able and eloquent counsel, or of the judge in summing up, as upon the testimony given in court, and in that way, perhaps, more complete justice is effected.

The French jury, in the criminal courts, consists of twelve, but unanimity is not required, the voice of a majority being sufficient in ordinary cases, there being some few exceptional instances, where the concurrence of two-thirds is required to give a verdict. We sat for a short time in the same court-room where the attempted or would-be assassin of the Czar, Berezowski, had been tried a few hours before. The same jury and the same judges still continued the session; the judges in their scarlet robes, and the minister of justice, in the person of the prosecuting attorney, clad in the same garb, occupying a seat half-way between the bar and the bench. The presiding judge called upon the accused, sitting between two *gens d'arme*, to plead, who stood up and stated briefly their plea, and whether they had or desired counsel. The judge then administered a long oath to the jury, which seemed to embrace a kind of charge as to their duty, and, at the close, called upon each member of the panel, by name, who gave his assent by raising the right hand. The representative of the minister of justice then proceeded with the trial, first examining the accused, giving him the full benefit of his own story, if that can fairly be regarded as any benefit, which may, we think, be considered as somewhat questionable.

There is in each *arrondissement* throughout the empire an Imperial tribunal to hear appeals from all the courts of first instance in that *arrondissement*. Paris, with some few of the adjoining districts, constitutes one *arrondissement*, and has its Imperial Court for hearing appeals from all the courts of first instance within that

district or arrondissement. We listened to a brief argument in this court from an advocate of great zeal and energy, who spoke in a very high key, and after reading some ten minutes from a manuscript, closed by an impassioned appeal to the court, which seemed to be regarded by them as so much matter of course as to produce no interruption of conversation between the different members of the court, which had very much the appearance of making light of the graphic flourishes of the argument, but which we have no doubt had no such appearance to the speaker. The tribunal, consisting of nine judges, or about that number, had certainly very much in their looks to recommend them. They were more youthful and had more the appearance of brilliancy than any court we had seen since leaving America. One would naturally suppose, from their looks only, that they possessed full competence, both of learning and ability, for the satisfactory discharge of their important and responsible functions, and that both their offices and their salary were placed beyond peradventure by the tenure under which they were held and the stability of the administrative power.

The judges in France hold office during life, or until the age of seventy, in all the courts; and until seventy-five in the High Court of Cassation. The distinction may be not without reason, since by such a provision, and by removing the most experienced of the judges of the subordinate tribunals into that high tribunal, as vacancies occurred, there would be constantly found in the court of last resort, a considerable proportion of judges of largest experience and most matured wisdom, with presumptively an equal, if not greater amount of learning, than could be secured in any other mode. And by extending the term of holding office in that court to seventy-five, the services of those judges who retained full strength to an exceptional period could be continued in the court of appeal.

It is certainly not a little wonderful that so large a proportion of the American states should prefer to have the office of the judges, from the highest to the lowest, dependent upon popular elections, at short intervals, when the experience of England and France, and of all governments, where there is any pretence of consulting the popular will in administrative functions, has shown most unquestionably that the rights of suitors and of those accused of crime, are most wisely consulted in making the judges

as nearly independent of all popular or administrative influence as is practicable. This is not a question which we propose to discuss here. But we cannot forbear to express our matured and settled conviction that the American people are acting under wrong impressions in the conclusion which seems everywhere to prevail, that judges are more reliable when dependent upon popular impulses, or, in other words, when not above being affected by the prevailing popular sentiment. There is no possible instrument more susceptible of easy and unjust perversion by bad men, or which bad men more often use for the accomplishment of their own base purposes than a suddenly excited and superficial popular impulse. And there is, of course, nothing through which a timid or time-serving judge would be more readily reached, or which would more naturally be resorted to for that purpose. The history of all judicial murders, and it is a dark page, and one by no means restricted to narrow limits—is marked at every step by the most awful extremes of popular frenzy. Neither Charles I. or Louis XVI. were among the most arbitrary or tyrannical of the English or French sovereigns. And there can be no fair question in the mind of any sound lawyer and loyal man that both these men were really the victims of rebellion and treason, and that those men who carried them to the scaffold would, in a change of relations, have been guilty of the very same offences which they affected to punish, in greater measure. That, indeed, was abundantly proved in the subsequent history of the two governments. And still those acts had the most unquestionable sanction of present popular sentiment. And it is equally true that the monarch whom the English people in the short period of half a generation recalled to the throne with shouts of acclamation, was in no sense the equal, either in ability or virtue, of his unhappy father, who, by the verdict of the same popular sentiment, justly suffered the penalty of death for imputed crimes of which he is now, by the united voice of the nation, regarded as not guilty, and which his idolized son was and is considered to be guilty, in intent certainly, if not, in all cases, in act. But it is perhaps the most conclusive argument in favor of the independence of the judiciary and of its superiority over all popular and political influences, that these calamitous consequences of popular frenzy, to which we have just alluded, both in England and France, have been the primary

and efficient cause of establishing their judicial tribunals upon the high vantage-ground of absolute and unquestionable independence. And it seems wonderful that so unequivocal a testimony of historical experience should not be more heeded by others.

There is one marked distinction between the jurisprudence of the English common and chancery law, and that of the Continental countries, based upon the Roman civil law, in regard to which there seems great ground for difference of opinion. In the English courts, and equally in the American, there is always supposed to be some precise technical rule by which the competency of each particular portion of the evidence is to be measured, and by which it must be rejected if found incompetent; and its effect in the case is supposed to become thereby entirely removed. We know that in practice this is not always possible to be done, and that causes will thus sometimes be determined upon the bias of mind unconsciously produced by the knowledge or the belief of the existence of incompetent evidence. But in the Continental countries almost everything offered is received by the judge. And in the trial of matters of fact before the common-law courts in England and America, a somewhat similar rule prevails, on the assumption that the court will be able to eliminate the portion of evidence which is competent, and only give effect to that in determining the case. And in the trial of cases in equity, a somewhat similar course of practice prevails, in allowing all fixed and immovable exceptions to the competency of evidence to be reserved, and passed upon at the final hearing of the cause. But in France, we found on consultation with the most eminent members of the bar, there existed a very general impression that their courts were enabled to do more perfect justice, in the particular cause, by disregarding all mere technical exceptions to the evidence, and giving every species of proof just such weight as its impression might be in the mind of the judge. It is asserted there, that the judge is never obliged to say, as is sometimes done in England and America, that although he has not the slightest doubt of the entire soundness of the claim or defence, it cannot be allowed, by reason of some formal defect.

There is another peculiarity in the administration of justice in France, which seems very singular to those who have not seen its practical operation. It grows out of having a separate department of justice in the cabinet, and a distinct minister of justice,

who takes cognisance, not only of the administration of criminal law, but who, to a certain extent, assumes the supervision of the civil department of judicial administration, by having some subordinate agent or minister always present in all the higher courts to listen to the trials, and, whenever he deems it of sufficient importance, to give his own views to the court in regard to the proper determination of the cause. Upon our first entering the Court of Cassation, the minister of justice, standing within the enclosure appropriated to the judges, was reading from an extended manuscript a formal and elaborate commentary upon a cause, the argument of which had been closed the day before, or perhaps a few days before. It gave one, whose views of judicial administration were derived from courts constituted like the English or American, the idea of subjecting the courts too much to cabinet or governmental influence. It seemed very much like converting the court into a jury, and requiring them to listen to the comments of a superior. We have no means of forming any judgment upon the effect of any such course of trial; but we should expect, that it would be likely to be of considerable weight in the determination of causes, if it were so managed as to beget respect, which would certainly be desirable and likely to occur in the administration of a government, so prudent and popular as that of the present Emperor of the French. An able and learned minister, in such a position, could scarcely fail to acquire great control over the decision of causes, and it would enable the ministry to exercise almost irresistible power in the determination of causes of international importance. We found the leading advocates of the French bar seemed to feel the importance of having causes of any considerable public interest, which came before the Court of Cassation, favorably introduced to the minister of justice, and, if convenient, by some advocate in the interest of the administration, or who was supposed to have its confidence. The working of this plan, which has existed for a very long period in some European countries, has not been specially objected to by suitors, or by any one so far as we know; but we cannot but believe it will be a long time before the American people will be prepared to submit to the existence of any such supervisory control over the administration of justice.

It is impossible not to admire much which exists in the governmental administration in France. It is unquestionably an able

and benign government, and one which gives great satisfaction to the people. It is wonderful how little of aristocratic effect or pretension meets the eye of the traveller in Paris, and most of that character which one does find here has more the appearance of a temporary importation than of being entirely indigenous.

There is, too, in the municipal administration of the large towns of the French Empire, a very surprising energy and zeal for improvement. The entire city, or town, of Paris, extending over many miles, is being pervaded by the opening of great thoroughfares with continuous lines of trees upon each side, and flanked by extended blocks of the most substantial and beautiful stone buildings, thus giving the entire city almost, the appearance of a newly built town, with an air of great cleanliness and neatness. This, doubtless, has some disadvantages in constantly removing the evidences of date. All this is done by the municipality of the district. The proprietors of the land and buildings are required either to build, in conformity with the plan furnished by the public authority, or else to sell at reasonable prices. If the proprietors, whether owners or lessees, elect not to build, and demand such prices, either for value or indemnity, as is deemed exorbitant, experts are selected, and all questions of indemnity or compensation are referred to them—and it is said that, practically, no cases of dissatisfaction occur. It seems to be the chief study of the French government, in every department, to give satisfaction to the people affected by its acts, and in doing so, to consult the future as well as the present, and to act upon the assumption, that the subjects of the empire will be controlled by considerations of reason and propriety rather than by caprice.

There may be much in the genius of the people to favor the result, but it cannot fail to strike all beholders alike, that in all departments of governmental administration, as well in the judicial as in the legislative tribunals, and equally in the multiplied ramifications of the executive bureaus, everywhere and at all times, the one great occasion for wonder and admiration is, how it should happen that every one, almost without exception, is made to feel so completely satisfied with all that befalls him, and equally with all which is inflicted upon him. It must be admitted that this is a great desideratum in government, and especially in the judicial administration. We have always regarded it as of

scarcely less importance in the determination of causes, whether civil or criminal, that the parties immediately affected by them should feel their justice, and propriety, and necessity even, than that they should be absolutely so decided. We know very well that a desire to render a judgment acceptable to the parties to be affected by it, may be carried to such an extent as to become a vice, or a weakness, and thereby most effectually defeat its object. But within reasonable limits, and when pursued by dignified and honorable means, the effort and desire to render governmental administration acceptable to those who are to be affected by it, is certainly to be commended.

I. F. R.

PARIS, July 20th 1867.

RECENT AMERICAN DECISIONS.

Supreme Court of Indiana.

GOTHILF BLOCH v. ABEL ISHAM AND BENJAMIN M. SCHENCK.¹

An agreement between adjoining owners of a town lot, A. and B., that A. might build a party-wall equally upon the land of both, and that whenever B. should build upon his lot so as to use the wall, he would pay one-half of the cost thereof, is not a covenant running with the land so as to entitle C., who had purchased A.'s lot, upon the performance of the condition as to the use of the wall, to sue B. for the money.

THE opinion of the court was delivered by

GREGORY, J.—The case made by the complaint is this: Schenck and Isham, being the owners of adjoining lots in Valparaiso, entered into a written agreement whereby Schenck acquired the right to build one of the walls of a brick store, then in process of erection on his own lot, with one-half of its thickness resting on the lot of Isham; and Isham acquired for himself, his heirs and assigns, the right to use the wall by joining a building thereon, and agreed for himself and them to pay one-half of the original cost of the wall when he or they should use it. Schenck completed the brick store on his lot, with one-half the width of

¹ We are indebted for this opinion to the Hon. R. C. Gregory.—EDS. AM. LAW REG.

one of its walls standing on Isham's lot. Afterward Schenck conveyed his lot and store to Bloch and others, and Bloch subsequently became the sole owner of the lot and its appurtenances; and while he was such owner Isham built a brick building on his own lot, and used the wall in question.

A demurrer was sustained to the complaint. The only question raised below, and here, is, whether Bloch or Schenck has the right to the pay for the wall used by Isham.

The case turns upon the solution of the question as to whether Isham's agreement to pay for one-half of the party-wall is a covenant running with the land.

There is some conflict in the authorities on this point. In *Burlock v. Peck*, 2 Duer (N. Y.) 90, the Superior Court of New York held that such a covenant passed to the grantee of the premises on which the building of the covenantor was erected. It is otherwise held in Pennsylvania: *Ingles v. Bringham*, 1 Dallas 341; *Todd v. Stokes*, 10 Barr 155; *Gilbert v. Drew*, Id. 219; *Hart et ux. v. Kucher*, 5 S. & R. 1. It is claimed that the cases in Pennsylvania turn on a statute. That statute simply provides that "the first builder shall be reimbursed for one moiety of the charge of the party-wall, or for so much as the next builder shall use before he breaks into the wall." There is nothing in this statute which is not embraced in the agreement of the parties in the case in judgment.

Brown v. Pentz, 1 N. Y. Leg. Obs. 24, was never officially reported, and we do not recognise it as authority. But we think that the ruling of the Supreme Court of Massachusetts in *Weld v. Nichols*, 17 Pick. 538, is conclusive on this question. It was there held that the liability to pay for the party-wall was a mere personal liability, and not repugnant to a covenant in a deed that the land was free from incumbrances.

The easement which passed from Schenck to his grantees was the right to the support of the party-wall afforded by that part thereof which rested upon the land of Isham.

Schenck and Isham were not tenants in common of the party-wall, but each owned that part thereof on his side of the line; Schenck advanced the money to build Isham's moiety, on the agreement of the latter that he or his heirs would repay it when he or they should have occasion to use the wall. This is clearly

a mere personal covenant, in no wise connected with or affecting the enjoyment of the lot conveyed to Bloch.

Judgment affirmed with costs.

In the Assize of Buildings, by Henry Fitz Elwyne, first mayor of London, (1 Richard I., A. D. 1189), it is enacted that "when it happens that two neighbors wish to build between themselves a stone-wall, each of them ought to give one foot and a half of his land; and so at their joint cost they shall build a stone-wall between them, three feet in thickness and sixteen feet in height. And, if they wish, they shall make a rain-gutter between them, at their joint cost, to receive and carry off the water from their houses, in such manner as they may deem most expedient. But if they should [not] wish to do so, either of them may make a gutter by himself, to carry off the water that falls from his house on to his own land, unless he can carry it into the king's highway.

"They may also, if they agree thereupon, raise the said wall as high as they may please, at their joint cost. And if it shall so happen that one wishes to raise such wall and the other not, it shall be fully lawful for him who so wishes it to raise the part on his own foot and a half as much as he may please, and to build upon his part, without damage to the other, at his own cost; and he shall receive the falling water in manner already stated.

"And if any one shall build of stone, according to the assize, and his neighbor through poverty cannot, or perchance will not, then the latter ought to give unto him who so desires to build by the assize, three feet of his own land; and the other shall make a wall upon that land, at his own cost, three feet thick and sixteen feet in height; and he who gives the land shall have one clear half of such wall, and may place his timber upon it and build.

"But this assize is not to be granted unto any one so as to cause any doorway, inlet, or outlet, or shop, to be narrowed or restricted, to the annoyance of a neighbor.

"This assize is also granted unto him who demands it as to the land of his neighbor, even though such land shall have been built upon, provided the wall so built is not of stone.

"Also, no one of those who have a common stone-wall built between them, may, or ought to, pull down any portion of his part of such wall, or lessen its thickness, or make arches in it, without the assent and will of the other.

"If any person shall wish to build the whole of a wall upon his own land, and his neighbor shall demand against him an assize, it shall be at his election either to join the other in building a wall in common between them, or to build a wall upon his own land and to have the same as freely and meritoriously as in manner already stated:" *Liber Albus of the City of London*, Book III., Pt. 2, p. 278 *et seq.*, edited by Henry T. Riley, under the direction of the Master of the Rolls, London, 1859.

This assize or ordinance, from which we have quoted at some length, as the volume is believed to be not generally found in the libraries of this country, exhibits a remarkable degree of efficiency for that early and turbulent day in the police regulations of that great city which, as Lord CAMPBELL says, was "a sort of free republic in a despotic kingdom;" *Lives of the Lord Chancellors*, 1, 8. The recent destructive fire in the reign of King Stephen, alluded to in *Liber Albus*, had led to a great improvement in building by the substitution of stone-walls and tiled roofs for the wood, thatch, and straw previously used, and

in the course of this change much dispute had probably arisen as to party-walls and the rights of support and roof-drainage depending thereon. Hence, this assize was ordained, as the preamble states, "*per discretiores viros civitatis, ad contentiones pacificandas.*" It is probable, however, that it only consolidated and enacted into positive law, the previous custom of the city. To this custom, the independent growth of the convenience and necessities of a large and compact city, we prefer to look for the foundation of the present law of party-walls, rather than to the urban servitude of the civil law, *tigni immittendi*, though similar circumstances produced similar laws in both cases, and in later times, no doubt, the just reasoning and mature wisdom of the civil law had great influence in developing the English law of party-walls as well as of other easements.

The custom of party-walls, developed by time and regulated by various statutes, was introduced into this country, together with the process of foreign attachment, the custom of *feme sole* traders, and other customs of London, by the first settlers in Philadelphia under William Penn, and in 1721 the legislature of Pennsylvania passed an act, still in force, regulating in detail the whole subject of party-walls in the city of Philadelphia. Under this act it has been held that the builder's right to compensation for one-half the party-wall is not a lien on the adjoining land, but a mere personal charge against the builder of the second house, and does not run with the land against his assignee: *Ingles v. Bringham*, 1 Dallas 341; *Hart v. Kucher*, 5 S. & R. 1. Therefore if the first builder be paid before the second house is built the right to compensation is gone; it is neither a hereditament nor an appurtenance to land and does not pass by a conveyance of the house: *Hart v. Kucher*, 5 S. & R. 1; *Dauids v.*

Harris, 9 Barr 501; *Todd v. Stokes*, 10 Id. 155; *Gilbert v. Drew*, Id. 219.

By statute, however, the right to compensation for use of a party-wall is now made an interest in the realty and passes by a conveyance of the house unless excepted in the deed: Act of 10th April 1849, Pamph. L. 600; *Knight v. Beeken*, 6 Casey 372.

Only a few of the general principles governing party-walls independently of statutory enactments have been discussed in this country.

1. Without a contract or statutory authority no owner has a right to build his wall beyond his own line, and if he does so the adjoining owner may treat it as a trespass and compel it to be taken down, or he may use it as a party-wall without paying anything for it: *Shererd v. Cisco*, 4 Sandford 480; *Orman v. Day*, 5 Fla. 385. The observations of Woodward, J., in *Zugenbuhler v. Gilliam*, 3 Clarke 391, that at common law the adjoining owner by using the wall makes it a party-wall and becomes liable for the value of half the wall, are not supported by authority, as the passage cited from 2 Bouvier's Inst. 178 is based on the statute of Pennsylvania. This case, therefore, except so far as founded on the statute of Iowa, cannot be regarded as sound law.

2. *Primâ facie* the wall and the land on which it stands are held in England to belong to the adjoining owners in moieties as tenants in common, but this presumption is rebutted when the amount of each one's ownership can be ascertained, and each is then owner in severalty of his portion: Gale on Easements 411 (3d London ed.) And the American courts are said to lean towards this latter presumption: *Shererd v. Cisco*, 4 Sandford S. C. 480. Each half, however, is subject to an easement of support for the other.

3. If two adjoining owners build a wall partly on each lot, and by express

agreement or by continuous use for twenty years, treat it as a party-wall, it becomes a technical party-wall and each has an easement of support for his half: *Webster v. Stevens*, 5 Duer 553.

4. So, if an owner of adjoining lots build upon them a wall partly on each, intended and necessary for the support of both, a conveyance of either house and lot with its appurtenances, grants an easement for the support of the house in so much of the wall as stands upon the other lot: *Eno v. Del Vecchio*, 4 Duer 53; 6 Id. 17.

5. After such a grant and continued use of the wall for twenty years neither can remove the wall or deal with his half so as to impair the support of the other's house: *Eno v. Del Vecchio*, 4 Duer 53; 6 Id. 17; *Potter v. White*, 6 Bosworth 644; *Phillips v. Bordman*, 4 Allen 147. In *Potter v. White*, one who took down a party-wall and built a new one without the consent of the adjoining owner, was held liable for loss of rent, and expenses of repair, &c., made necessary by the removal of the old wall and building of the new. In *Phillips v. Bordman*, the Supreme Court of Massachusetts granted an injunction to restrain one owner of an ancient party-wall from cutting away a portion of its face and erecting a new wall on his own land two inches from that part of the old wall left standing, and connected with it and supporting it by occasional projecting bricks and ties.

And in *Eno v. Del Vecchio*, *ubi sup.*, it was said that if either wishes to change the wall he may do so within the limits of his own lot, provided he does not injure the other, and for such purpose he may shore up the whole wall for a reasonable time while the changes are in progress, but if he does this without the consent of the adjoining owner, he does it at his own peril, as the question of negligence does not come in at all, and no degree of care or skill will relieve

him from liability if injury is actually done.

The Supreme Court of Ohio, however, have held the contrary, and that where owners of adjoining lots build a party-wall by express agreement for the support of their houses, but without any stipulation as to the continuance of the wall, either party or his grantee has a right to take down his part of the wall, after notice and using sufficient care—although it may have been used as a party-wall for twenty-one years; and where the wall fell down, notwithstanding the care, it was held that there was no cause of action: *Hieatt v. Morris*, 10 Ohio State 523.

The rules above enunciated in *Eno v. Del Vecchio* and other cases do not, however, apply to a party-wall built by tenants for years of adjoining lots, so as to affect the reversioners or their grantees: *Webster v. Stevens*, 5 Duer 553. And the right to use the party-wall is only the right to use it *as it has been used*. Thus, A. conveyed a house to B. with a reservation, "the owners on both sides to have mutual use of the present partition-wall." The wall was entirely on the lot conveyed to B., and only a portion of it was used as a partition-wall. A. subsequently conveyed the adjoining lot to C., who enlarged the house and used a greater part of the wall than was so used at the time of the conveyance to B. Held that he was liable to B. for damages in so doing: *Price v. McConnell*, 27 Ill. 255.

6. How long the easement of support acquired by lapse of time or by contract not specifying the term for which it is granted, continues, is still an unsettled question. That it continues so long as the wall remains safe and well adapted to the original purpose, appears to be conceded by all the cases except *Hieatt v. Morris*, 10 Ohio State 523, already cited (*supra* 5). When, however, the wall becomes ruinous and unsafe or unfit for

its purpose of support, either party has a right to take down his half in a skilful manner, after due notice to the other party. And if one-half cannot be taken down without danger, the owner may take down the whole, and such right is not affected by the nature of the use or occupation of the other building: *Campbell v. Mesier*, 4 Johns. Ch. 334; *Partidge v. Gilbert*, 3 Duer 184; s. c., 15 N. Y. 601.

But whether the right of support continues longer than the existence and fitness of the old wall is questionable. In *Campbell v. Mesier*, 4 Johns. Ch. 334, Chancellor KENT appeared to think that the easement was in fee, and where one owner pulled down an ancient party-wall which had become ruinous, and rebuilt it, the Chancellor held the adjoining owner liable to contribute rateably to the expense, provided that if the new wall should be higher or of more expensive material than the old one, the builder should pay the extra expense. But in *Sherrerd v. Cisco*, 4 Sandford 480, it was held that if the wall be destroyed by fire or accident the adjoining owners are not bound to contribute to rebuild it. The land becomes freed from all servitude in relation to the party-wall, as in case of two adjoining lots without buildings. And in *Partridge v. Gilbert*, 3 Duer 184, 15 N. Y. 601, DENIO, C. J., was of opinion that the right to support ceased when the wall became unfit, whether from age or accident, and that each owner was then remitted to his original unincumbered title to the division-line, citing *Sherrerd v. Cisco*, and dissenting from the views in *Campbell v. Mesier*. In the same case, however, SHANKLAND, J., seemed of the contrary opinion, and approved *Campbell v. Mesier*.

7. In regard to the right to compensation for the use of a party-wall, the cases differ. In Pennsylvania, in the cases cited above, it was held, until the Act of 1849, that it was a personal right of

the builder against the person using the wall, and did not run with the land either in favor of the assignee of the first builder or against the assignee of the second builder. To the same effect is the principal case. In New York, however, the decisions are otherwise. Thus, in *Burlock v. Peck*, 2 Duer 90, A., owning two adjoining lots, conveyed one of them with the privilege to the grantee of building a party-wall on the division-line one-half on each lot, and covenanted to pay for one-half the wall when used. A.'s grantee built the wall, and then conveyed to B. A. then conveyed the adjoining lot, and his grantee used the wall. Held, that B. could recover of A. or his executors the value of one-half the wall. And, also, that B. having died after the use of the wall by the grantee of the adjoining lot, the action was properly brought by B.'s administrator, not his heir.

In this case the question of the liability of the grantee of the second lot, who actually used the wall, was not raised, but in *Keteltas v. Penfold*, 4 E. D. Smith 122, a covenant by A. for "himself, his heirs and assigns," to pay for half a party-wall when used, was held to run with the land so as to charge A.'s devisee. And in *Weyman's Ex'rs. v. Ringold*, 1 Bradford 52, a covenant to pay one-half the value of a party-wall when used, to the builder, "his executors or assigns," was held to run with the land in favor of the grantee of the covenantee. In the last case it was expressly agreed that the covenant should bind the lands "and the successive owners thereof," but the surrogate was of opinion that the covenant ran with the land independently of this agreement.

See, also, *Giles v. Dugro*, 1 Duer 331, where A. covenanted with B., his vendee, that the premises sold were clear of "all former or other grants, bargains, and incumbrances whatsoever," but, in

fact, A. had previously conveyed to C. the right to use a wall as a party-wall, and it was held that this was an incumbrance, and the use of the wall a partial eviction of B., who was entitled to re- cover from A. a sum having the same ratio to the purchase-money as the value of the land so occupied by C. bore to the value of the whole.

J. T. M.

Supreme Court of Pennsylvania.

THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY v. HINDS AND WIFE.

Where a passenger on a railway train is injured by the misconduct of a fellow-passenger, the company is liable only in case there was negligence in its officers in not making proper efforts to prevent the injury.

Railroad companies are bound to furnish men enough for the ordinary demands of transportation, but not a police force adequate to extraordinary emergencies,—as to quell mobs by the wayside.

It is negligence in a conductor to voluntarily admit improper persons or undue numbers into the cars.

Where the evidence shows that an excited crowd, at a way station, among whom were drunken and disorderly persons, rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, it is error in the court to submit that to the jury from which they may find negligence in the conductor in admitting in the cars either improper persons or undue numbers.

In case of fighting or disorder in the cars the conductor must at once do all he can to quell it. If necessary, he should stop the train, call to his aid the engineer, firemen, all the brakemen and willing passengers, lead the way himself and expel the offenders, or demonstrate by an earnest experiment, that the undertaking is impossible.

ERROR to Common Pleas of *Allegheny county*.

The facts and material points raised in the case are fully stated in the opinion.

Hampton, for plaintiff in error.

Marshall, contra.

The opinion of the court was delivered by

WOODWARD, C. J.—The action is for an injury sustained by the plaintiff's wife whilst she was a passenger in the cars of defendant; and what is peculiar in the case is the fact that the injury was not occasioned by defective machinery, or cars, or road, or by anything that pertained properly to their business as

transporters, but was caused by the fighting of passengers among themselves. Drunken and quarrelsome men intruded into the ladies' car in great numbers whilst the train stopped at Beaver station; and in the disgraceful fight which ensued among them the plaintiff's arm was broken, and for this the railroad company is sued. Had the suit been against the riotous men who did the mischief, the right of recovery would have been undoubted, for it is not more the duty of railroad companies to transport their passengers safely than it is the duty of passengers to behave in a quiet and orderly manner. This is a duty which passengers owe both to the company and to fellow-passengers, and when one is injured by neglect of this duty the wrongdoer should respond in damages. But in such a case, is the company liable?

There is no such privity between the company and the disorderly passenger as to make them liable on the principle of *respondet superior*. The only ground on which they can be charged is a violation of the contract they made with the injured party. They undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action; it can rest upon no other. The negligence of the company or of their officers in charge of the train is the gist of the action, and so it is laid in the declaration. And this question of negligence was submitted to the jury in a manner of which the company have no reason to complain. The only question for us as a court of error, therefore, is whether the case was, upon the whole, one that ought to have been submitted. The manner of the submission having been unexceptionable, was there error in the fact of submission? .

The learned judge reduced the case to three propositions. He said the plaintiff claims to recover,

1st. Because the evidence shows that the conductor did not do his duty at Beaver station, by allowing improper persons to get on the cars.

2d. Because he allowed more persons than was proper under the circumstances to get on the train, and to remain upon it.

3d. That he did not do what he could and ought to have done to put a stop to the fighting upon the train which resulted in the plaintiff's injury.

As to the first of the above propositions, the judge referred the evidence to the jury especially with a view to the question

whether the disorderly character of the men at Beaver station had fallen under the conductor's observation so as to induce a reasonable man to apprehend danger to the safety of the passengers.

The evidence on this point was conflicting, but it must be assumed that the verdict has established the conclusion that the conductor knew that drunken men were getting into the cars. Let it be granted also as a conclusion of law that a conductor is culpably negligent who admits drunken and quarrelsome men into a passenger car. What then?

The case shows that an agricultural fair was in progress in the vicinity of Beaver station; that an excited crowd assembled at the station rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, and that the man who commenced the fight sprung upon the platform of the hindmost car after they were in motion.

Of what consequence, then, was the fact that the conductor knew these were improper passengers? It is not the case of a voluntary reception of such passengers. If it were there would be great force in the point, for more improper conduct could scarcely be imagined in the conductor of a train than voluntarily to receive and introduce among quiet passengers, and particularly ladies, a mob of drunken rowdies. But the case is that of a mob rushing with such violence and in such numbers, upon the cars, as to overwhelm the conductor as well as the passengers.

It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration.

When passengers purchase their tickets and take their seats they know that the train is furnished with the proper hands for the conduct of the train, but not with a police force sufficient to quell mobs by the wayside. No such element enters into the implied contract. It is one of the incidental risks which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter.

These observations are equally applicable to the second proposition. The conductor did not "allow" improper numbers, any more than improper characters, to get upon the cars. He says

he took no fare from them, and in no manner recognised them as passengers. To allow undue numbers to enter a car is a great wrong, almost as great as knowingly to introduce persons of improper character, and, in a suitable case, we would not hesitate to chastise the practice severely. But this is not a case in which the conductor had any volition whatever in respect either to numbers or characters. He was simply overmastered ; and the only ground upon which the plaintiff could charge negligence upon the company would be in not furnishing the conductor with a counter force sufficient to repel the intruders. This was not the ground assumed by the plaintiff, and it would scarcely have been maintainable had it been assumed.

Taking the case as it is presented in the evidence, we think it was error for the court to submit the cause to the jury on these two grounds. But upon the third ground we think the cause was properly submitted.

If the conductor did not do all he could to stop the fighting, there was negligence. Whilst a conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and, if properly used, they are generally sufficient to preserve order within the cars, and to expel disturbers of the peace. His official character and position are a power. Then he may stop the train and call to his assistance the engineer, the firemen, all the brakemen, and such passengers as are willing to lend a helping hand, and it must be a very formidable mob indeed, more formidable than we have reason to believe had obtruded into these cars, that can resist such a force. Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion and busy himself with collecting fares in forward cars whilst a general fight was raging in the rearmost car where the lady passengers had been placed, was to fall far short of his duty. Nor did his exhortation to the passengers to throw the fighters out come up to the demands of the hour. He should have led the way, and no doubt passengers and hands would have followed his lead. He should have stopped the train and hewed a passage through the intrusive mass until he had expelled the rioters, or have demonstrated, by an earnest experiment, that the undertaking was impossible.

Such are the impressions which this novel case has made upon our minds. We think there was error in submitting the case upon the first two propositions, but none in submitting it on the third; and if the record showed that the jury decided it upon this latter ground, the judgment could be affirmed. But inasmuch as the error we find upon the record may have infected the verdict, the judgment must be reversed, and a *venire de novo* awarded.

Supreme Court of Michigan.

THE WESTERN UNION TELEGRAPH CO. v. JOHN H. CAREW.

Telegraph companies, in the absence of any provision of the statute, are not common carriers, and their obligations and liabilities are not to be measured by the same rules, but must be fixed by considerations growing out of the nature of the business in which they are engaged. They do not become insurers against errors in the transmission of messages, except so far as by their rules and regulations, or by contract, they choose to assume that position.

When a person writes a message under a printed notice, requesting the company to send such message according to the conditions of such notice, *held* that the printed blank was a general proposition to all persons of the terms and conditions upon which messages would be sent, and that by writing said message and delivering it to the company, the party must be held as accepting the proposition, and that such act becomes a contract upon those terms and conditions.

Where a telegraph company established regulations to the effect that it would not be responsible for errors or delay in the transmission of unrepeatable messages, and further, that it would assume no liability for any error or neglect committed by any other company over whose lines a message might be sent in the course of its destination, *held*, that such regulations were reasonable and binding on those dealing with the company.

ERROR to Wayne Circuit.

This was an action of assumpsit brought by defendant in error, to recover damages for the failure on the part of plaintiff in error to transmit correctly a certain telegraph message from Detroit to Baltimore. The charges were paid to Baltimore, though plaintiff in error's lines only extended to Philadelphia. The message was correctly sent to Philadelphia, and delivered there to the agent of the Baltimore line. The error occurred between that point and Baltimore.

On the face of the paper upon which the message was written, was printed the following immediately above the written message:—

"WESTERN UNION TELEGRAPH CO.—COMMERCIAL MESSAGE.**SEE CONDITIONS ON BACK.**

Write plainly. Give full address. Use no abbreviations or figures. Send the following message, without repeating, subject to above conditions and agreement indorsed on back."

On the back of the same paper, in full and clear type, was printed the following:—

"WESTERN UNION TELEGRAPH COMPANY.**CONDITIONS.**

In order to guard against and correct as much as possible some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be repeated by being sent back from the station at which it is received to the station from which it is originally sent. Half the usual price will be charged for repeating the message. And while this company in good faith will endeavor to send messages correctly and promptly, it will not be responsible for errors or delays in the transmission or delivery, nor for the non-delivery of repeated messages beyond two hundred times the sum paid for sending the message, unless a special agreement for insurance be made in writing, and the amount of risk specified on this agreement, and paid at the time of sending the message. Nor will the company be responsible for any error or delay in the transmission or delivery or for the non-delivery of any unrepeated message beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated thereon and paid for at the time. No liability is assumed for error in cipher or obscure messages. Nor is any liability assumed by this company for any error or neglect of any other company over whose lines this message may be sent to reach its destination. And this company is hereby made the agent of the sender of this message to forward it over the lines extending beyond those of this company.

"No agent or employee is allowed to vary these terms, or to make any other or verbal agreement, nor any promise as to the time of performance; and no one but a superintendent is authorized to make a special agreement. These terms apply through the whole course of this message, on all lines by which it may be transmitted."

The plaintiff below testified—and there was no evidence to the contrary—that he never read the above conditions, nor had his attention called to them; that he was not informed, nor did he know that the message passed over the line of any other company on its way to Baltimore, or that it was necessary to repeat the message in order to hold the company responsible for mistakes.

The line of this company extended only to Philadelphia. The message was correctly transmitted to that point, and there correctly delivered to the agent of the line from Philadelphia to Baltimore. But when received at Baltimore the message read

"four cases," instead of "forty," and the four cases only were sent by Rowe & Co. This action is brought to recover the damages resulting from this error.

The court charged the jury:—

1. That the plaintiff was not bound by the conditions on the back of the despatch, unless his attention was called to them.

2. That it is immaterial on which line the error occurred; the defendant having received the pay for the proper transmission of the despatch from Detroit to Baltimore.

3. That if the plaintiff's attention was not called to the necessity of repeating the message in order to secure its correct delivery, he was not bound so to do to entitle him to recover.

To each of these charges exception was taken; and the court was requested, but refused, to charge directly the contrary; and that there was a fatal variance between the contract declared upon and that proved (the declaration being upon an absolute undertaking to send to and deliver the message at Baltimore).

Judgment for plaintiff below.

Walker & Kent, for plaintiff in error.—1. Telegraph companies are in no proper sense common carriers, or indeed bailees of any sort.

Bailment in all its forms is a contract on the part of the bailee to take some particular thing or person, and deliver again the same thing or person.

The telegrapher receives a certain message, written or spoken, and undertakes, not to convey the identical message or words, but to reproduce the same words at another place, and to another person. He may neglect or refuse to perform his promise, but the thing received cannot be stolen, cannot be lost.

The ground on which, by the policy of the law, the common carrier is made an insurer, is that the goods intrusted to him are absolutely in his power; that without danger of detection he might claim that they had been lost or stolen: 1 Pars. on Cont. 634.

The reason of the rule failing as to telegraphers, it is unjust to apply to them a rule confessedly harsh in its application to carriers.

He should not be held responsible for mistakes without negligence, and from causes beyond his control.

A declaration against him should always aver that he promised to use reasonable diligence and skill; and the breach should be an allegation of neglect.

2. The contract is a special one; the printed conditions form a part of it.

The conditions were general regulations made by the company. They are reasonable regulations, and Carew was bound to take notice of them. If he wanted to send a message, he should have inquired on what terms the company sent messages.

By writing his message upon the company's blank, Carew assented to the conditions written thereon; and is now estopped from denying his knowledge of them. Even though telegraph companies were to be held to the strict rules of a common carrier, still they could make special contracts limiting their general liability.

This doctrine is settled in this state: 6 Mich. 243; 25 New York 442; 5 H. & N. 867; 45 Barb. 274; 33 E. L. & Eq. 180; 18 Md. 341; 1 Metc. (Ky.) 164.

C. Hunt, for defendant in error.—It is not claimed that defendant in error ever read the conditions on the printed blanks of the company, or that his attention was ever called to them.

1. The principle is elementary that no party can be bound by an instrument, the contents and conditions of which are concealed, or even if the same were not disclosed by the party benefited thereby.

Telegraph companies, like common carriers, may limit their liability by a special acceptance when the message is delivered to them, but it must be brought home to the knowledge of those employing them: 3 Mich. 39; 6 Id. 257.

2. The same rule must apply to telegraph companies that applies to common carriers, who receive the whole compensation for the carriage of a package addressed to a place beyond the limits of their own route. That is, that he engages for the due delivery of the package at the place of destination, unless he expressly limits his responsibility to his own route; or the circumstances are such as to clearly indicate that that was the understanding of the contracting parties: 19 Wend. 534; 25 Id. 660; 8 M. & W. 421; 3 Sandf. S. C. 610; 24 Barb. 382; 43 Id.

225; 8 Pick. 23; 5 B. & P. 182; 4 Dall. 206; 5 Am. Law Register 414.

The opinion of the court was delivered by

CHRISTIANCY, J. (after stating the facts).—If the printed request on the face of the paper, to “send the message without repeating subject to above conditions and agreement on back,” together with the terms and conditions referred to, constituted or governed the contract for transmission, then the entire charge of the court was wrong, and the plaintiff below had no right to recover.

The competency of the parties to enter into such a contract is not denied—but it is insisted that telegraph companies are common carriers; that carriers cannot limit their common-law liability by a mere notice, because the other party has the right to insist upon having his goods carried by them, subject to their common-law liability, notwithstanding the notice; that the parties employing them are not bound to pay any attention to such notice; and to exempt the carrier from such liability it must be shown, not only that the notice was brought home to the party dealing with him, but that he actually assented to the terms.

We do not deem it necessary to discuss the case upon this theory. Our opinion upon its application to carriers will be expressed in the several cases of the Michigan Southern and Northern Indiana Railroad Co., now before us. We are all agreed that telegraph companies, in the absence of any provision of statute imposing such liabilities, are not common carriers, and that their obligations and liabilities are not to be measured by the same rules; that they do not become insurers against all errors in the transmission or delivery of messages, except so far as by their rules and regulations, or by contract or otherwise, they choose to assume that position, or hold themselves out as such to the public, or to those who employ them. The statute of this state authorizing such companies, and, to some extent, prescribing their duties and liabilities, imposes no such liability: Comp. L. Ch. 70.

Impartiality and good faith are the chief, if not the only, obligations required by the statute, so far as relates to the question here involved. Beyond these statute requirements, their obligations must be fixed by considerations growing out of the nature

of the business in which they are engaged, the character of the particular transactions which may arise in the course of their business, and the application of the principles of justice and public policy recognised alike by common sense and the common law. The statutes of the other states in reference to this branch of business are in the main substantially like our own.

Telegraph companies, like common carriers, it is true, exercise a public employment, and the former are bound to send messages for those who apply and are ready to pay the usual or settled charges, as the latter are bound to transport goods for those who seek their services upon similar terms; and doubtless the same rules for securing impartiality would apply to both, except as modified by statute: see section 15 of chapter 70, above cited. But beyond this, as relates to the actual transportation of goods in the one case, and the transmission of ideas in the other, there is, in the nature of things and the different means and agencies employed, but very little substantial resemblance; and any analogy must be more fanciful than real, and likely to lead to error and injustice. This is not a case which calls upon us for laying down the rules, which must be held to govern as to the degree of skill, care, and diligence to be required in the transmission of messages. But, doubtless, the use of good apparatus and instruments would be required, and reasonable skill, and a high—perhaps the very highest—degree of care and diligence in their operation. And when an error has occurred in the transmission of a message, it may be found that they ought to be held *prima facie* guilty of negligence, the onus of proof resting upon them to show diligence, the means for doing this being peculiarly within their knowledge and power.

But it would be extremely unjust, and, considering the small amount of compensation for sending a message, would effectually put an end to this method of correspondence, to hold them absolutely liable as insurers for the entire correctness of all messages transmitted, or to hold them responsible for all damages which might accrue from an error, especially when only a single transmission, without repeating, is relied upon or paid for; or, to deny them all power by rules, regulations, or notices to *limit* their liability even in the case of repeated messages. And it would be equally unreasonable to require them to repeat a message when they are paid only for a single transmission.

And while, in settled weather, or when the normal condition or operation of the electrical currents is not affected by any temporary or local disturbance, a single transmission by a skilful operator may be relied upon, as a *general rule*, and for matters of comparatively small importance, yet it must be well known to most men (if not to all who have such a decree of intelligence as to be likely to resort to this mode of correspondence) that the electrical state of the atmosphere is liable to sudden and violent changes, extending over areas of greater or less extent, which cannot be foreseen or guarded against, and which materially affect the currents transmitted from a battery along the wires, and for a time render the operation of the instruments uncertain and unreliable; that these disturbances often affect distant portions of the line or of a connecting line, while their influence may be scarcely felt or not felt at all at the station from which a message is sent, and that therefore to insure entire and uniform correctness, the only safe method is to have the message verified by repeating it back to the station from which it was sent.

The regulation therefore of most, if not all telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message, or any other circumstance which may affect the question.

And as the compensation ought always to be in proportion to the risk assumed, the provision in these regulations in reference to insurance, must be regarded also as just and reasonable.

As the statute of this state (and of the other states, so far as we have examined them) requires them to receive despatches from and for other telegraph lines, and to transmit, &c., it is but reasonable, when the same message is to pass over the lines of more than one company, that each should be responsible only for the errors occurring on its own line; and the receipt of the money by the company first transmitting the message, as the agent of the other lines, is much more for the convenience of the person sending the message, than for that of the company.

Such being the reasonable and settled rules, regulations, and usage of this company, it was, we think, for the plaintiff, before sending his message, to acquaint himself with those rules, regu-

lations, and usages, and the terms upon which messages would be sent. And in the absence of any special inquiry by him upon the subject, the natural inference would seem to be, either that he already knew and assented to such rules, regulations, or usages, or that he intended to assent to them whatever they might be.

But to give to all who should wish to send messages full information upon these matters, in an authentic and reliable form, which could not so well be done verbally by special explanations to each applicant, this company has very properly printed their rules and regulations upon the very paper upon which each message is to be written; and upon the very face of the paper immediately preceding the blank space on which the message is written, is the printed request to send the message "subject to above conditions and agreement indorsed on back." The signature of the message becomes also an adoption of, and signature to, this request. The party sending the message fills up and signs the printed blanks; and, in form, at least, it is as much his contract as if he had written the whole printed conditions or a contract in which they were inserted with his own hand.

This printed matter on the face of the paper could hardly escape the attention of any one not naturally or purposely blind, who should write a message upon the paper. He must at least know that there is some printed matter on the face of the paper, and he must be held to know that it has been placed there for some purpose connected with the message. It is therefore no excuse for him to say he did not read this printed matter before his eyes. It was gross carelessness on his part if he did not.

The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions: *Breese v. United States Telegraph Co.*, 45 Barb. 274, a parallel case, in all material respects, with the reasoning of which we are fully satisfied. See also *Lewis v. Great Western Railway Co.*, 5 H. & N. 867; *Bryant v. Telegraph Co.*, 1 Daley 578; *McAndrews v. Telegraph Co.*, 33 Eng. L. & Eq. 180.

The conditions on the back of the message, it is true, did not state where the line of this company terminated, nor what other

line the message must pass over. But the reference to the terms of sending over other lines, was sufficient, if the plaintiff deemed it of any importance to him, to put him upon inquiry, when the fact would at once have been ascertained.

The contract, which the evidence tended to show, was for a single transmission by the company over its own line without repetition, and for delivering the message as the agent of the plaintiff to the next line in its course to Baltimore; a contract which the evidence tended to show had been fully complied with. The contract, therefore, was essentially different from that declared upon. The charge was erroneous upon all the points stated in the record.

The judgment must be reversed, with costs, and a new trial awarded.

CAMPBELL and COOLEY, JJ., concurred.

District Court of the United States. Southern District of New York. In Bankruptcy.

MATTER OF CHARLES G. PATTERSON.¹

Where a creditor made a motion for an order to examine a bankrupt before the first meeting of creditors, and the bankrupt objected that no such order could be made at such time, this raised an issue of law which the register should have certified to the court.

But if the bankrupt argues and submits the question to the judgment of the register, he waives his right to a certificate, and if, after a decision against him, he submits his points and requests an adjournment to the court, he is too late. After a decision by the register there is no issue to certify.

A creditor has a right to prove his claim at any time after the commencement of proceedings, and having done so has a right to an order for the examination of the bankrupt under section 26, without waiting for the meeting of creditors.

If depositions in proof of claims are filed before the day appointed for the meeting of creditors, the register is not bound to notify the bankrupt.

Notwithstanding the filing of such a deposition and entering the claim on the list, the register may still, under section 23, at the first meeting of creditors postpone the proof of the claim and exclude the creditor from voting in the choice of an assignee.

The court has, under section 22, full control at all times, of all debts, and all proofs of debts, even after the depositions in proof have been filed; and the bankrupt can, at the first meeting of creditors, object, under section 23, to the validity of, and the right to prove any debts, without regard to the time the depositions in proof were filed.

¹ We are indebted for this case to "The Gazette." EDS. AM. LAW REG.

In this case an adjudication of bankruptcy was made September 12th 1867, and a warrant was issued to the marshal returnable October 23d.

On the 23d of September, Tupper & Beattie, creditors on the debtors' schedules, filed a proof of debt. On the 25th of September, Tupper & Beattie made a motion before the register for an order for the examination of the bankrupt, under section 26 of the act, and according to No. 45. The bankrupt objected to the granting of the order, on the ground that the order could not be made before the first meeting of creditors.

After argument the register granted the motion. Thereupon the bankrupt moved that the question be adjourned into court, for the decision of the judge under the provisions of section 4 of the act, and tendered his questions, and issues to the creditor in order that the creditor should state his points, and that, issue of law being thus joined, the same might be adjourned into court by the register for decision by the judge, as provided for in the 4th section of the act. To this tender the creditors objected, and they declined to receive the questions, or to join in the issue, on the grounds that their motion had been granted, and that there was no question or issue of law raised, inasmuch as section 26 of the act provided distinctly that the court might, on the application of any creditor, at all times require the bankrupt to attend and submit to examination, and that if the bankrupt wished to raise the question of the register's power to make the order before the return of the warrant, he could take the opinion of the judge, by a certificate of the register, under the provisions of section 6 of the act. The register declined to grant the motion of the bankrupt to adjourn the question into court, inasmuch as there was no issue joined, and decided that the proper course under the law, if the bankrupt questioned the right to make the order for examination before the warrant was returned, and decided to take the opinion of the judge thereon, was to do so by a certificate of the register under the provision of section 6 of the act.

BLATCHFORD, J.—The order requires the examination to take place on the 9th of October. The bankrupt objected to the action of the register, and requested four questions to be certified to the judge, which has accordingly been done by the register.

1. Whether the matter of granting the motion for an order for

examination should not have been adjourned into court for the decision of the judge; and whether, after the bankrupt had tendered his points at issue, the register did not err in granting said motion, and in refusing to adjourn the same into court for the decision of the judge.

As regards this question, the register states that he thinks that it was not necessary to adjourn the matter into court; firstly, because issue was not joined between the parties; secondly, because section 6 provides a sufficient, and the most clear way to take the opinion of the judge on the point without suspending proceedings in the matter.

The question of granting the motion for an order for examination ought to have been adjourned into court for the decision of the judge.

The 4th section of the act requires, that "in all matters where an issue of fact or of law is raised and contested by any party to the proceedings," before the register, "it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for the decision by the judge."

Now the objection made by the bankrupt before the register to the granting of the order for examination, on the ground that the order could not be made before the first meeting of creditors, raised an issue of law, which was contested. That issue it was the duty of the register to adjourn into court for decision by the judge. Instead of so doing he granted the motion, and thus decided the issue of the law himself. But the bankrupt after raising the issue of law, appears to have argued it, and submitted it for decision to the register without requesting the register to adjourn it into court, and without objecting to its decision by the register. The granting by the register of the motion of the creditor disposed of the question, and after that there was no issue or question to be adjourned. It is the duty of the register to adjourn an issue of law into court without any request to that effect by a contesting party. But still such adjournment is a proceeding which a contesting party may waive, and where he does waive it, by submitting the decision of the issue to the register, he cannot, after finding that the question is decided against him by the register, then ask to have it adjourned into court. If, instead of virtually requesting the register to decide

the issue, by arguing the question, and awaiting the register's decision, the bankrupt had, on raising the issue, requested the register to adjourn it into court, the case would have presented a different aspect. But as it was, the tendering by the bankrupt of his points after the decision, imposed upon the register no objection to adjourn them into court.

2. Whether under the Bankrupt Law Tupper & Beattie are creditors, who have proved their claim so as to entitle them to make the motion. In regard to this question, the register states that he considers Tupper & Beattie to be creditors who have proved their claim, they having fulfilled all the requirements of the law, and there being no restriction as to the time when the claim may be proved after proceedings are commenced; that the first meeting of creditors is for the choice of an assignee by those who have proved their claims; that he can see no reason why creditors should wait until the return-day of the warrant to make their proof; that the debt which exists is the basis of the right to appear as creditor; and that creditors should be allowed to judge for themselves as to when they will take advantage of the law and appear.

I concur with the register in these views. The creditors in this case having proved their claim, had a right to make the motion.

3. Whether before the day appointed for the first meeting of creditors, a creditor can, under the act, prove his claim, and so become a party to the proceeding in bankruptcy, as to be entitled to an order for the examination of the bankrupt under the 26th section of the act.

In regard to this question, the register states that he thinks that when once a creditor has proved his claim, he has, unless the same be questioned, full right under the law, and may at any time call for an examination of the bankrupt. The register is correct in this conclusion.

4. Whether if in the interval between the issuing of the warrant in bankruptcy and the day appointed for the first meeting of creditors, and for proof of claims and choice of assignee, a deposition in proof of a claim against the bankrupt is filed, it is not the duty of the register to notify the bankrupt or his attorney before allowing the same, and entering it upon the list (Form

No. 13), so that objection to the proof thereof may be made, if any exist, under section 23 of the act.

In regard to this question, the register states that he does not think that the bankrupt need be notified of the filing of claims, prior to the first meeting of creditors; that it is a matter of no consequence to him whether creditors file them before or after; and that the bankrupt having surrendered all his property for the benefit of all his creditors, could with perfect propriety and honesty leave all questions connected with his estate to them, without regard to what disposition is made of it.

It is not the duty of the register to notify the bankrupt or his attorney before the first meeting of creditors, of the filing of such depositions in proof of claims, as may be filed before such first meeting.

Notwithstanding the filing of such a deposition before such first meeting, and the entering the claim on a list (Form No. 13), the register may still, at such first meeting, under section 23, postpone the proof of the claim, and exclude the creditor from voting in the choice of an assignee.

The court has, under section 22, full control at all times of all debts, and all proofs of debts, even after the depositions in proof have been filed, and the bankrupt can at the first meeting of creditors, object, under section 23, to the validity of and the right to prove any debts, no matter whether the deposition in proof thereof is filed at such first meeting or was filed previously.

*District Court of the United States. Northern District of Ohio.
In Bankruptcy.*

MATTER OF DAVIS & SON, BANKRUPTS.

A creditor holding security, although he has proved his debt under section 22, cannot vote in the election of an assignee.

IN this case A. C. Gardner, a creditor of the bankrupt, proved his claim before the register, being a debt secured by mortgage on real estate, and the question arose whether he could be allowed to vote at the first meeting of creditors in the choice of an assignee.

J. M. Jones, for the bankrupt.

Payne & Wade, for the creditor.

The question and the register's opinion were certified to the court as follows, by

M. R. KEITH, Register.—Section 13 provides that the creditors shall, at the first meeting held after due notice from the messenger, in the presence of a register designated by the court, choose one or more assignees of the estate of the debtor, the choice to be made by the greater part in value and in number of the creditors who have proved their debts.

Sect. 23 provides that the court shall allow all debts duly proved, and shall cause a list thereof to be made and duly certified by one of the registers.

Sect. 20 provides that when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property to be ascertained by agreement between him and the assignee, or by a sale thereof to be made in such manner as the court shall direct.

Sect. 13, above referred to, allows all creditors who have proved their debts to participate in the choice of an assignee. The certified list of creditors required by section 23, is for the purpose of spreading upon the record a statement of the names of all admitted as creditors, and the amount due to each.

Sect. 20 in my opinion, so far as voting for assignee, limits the creditors to those who are not secured, for it provides that creditors holding security shall *be admitted as creditors* only for the balance of their debts, after deducting the value of the security, and that value can only be determined by agreement between him and the assignee, or by sale of the property, which cannot be agreed on between them, or ascertained by sale until after the assignee is chosen.

I am, therefore, of the opinion, that a creditor holding security, although he has proved his debt as provided in the 22d section of the Bankrupt Act, cannot vote in the election of assignee.

SHERMAN, District Judge, concurred with the register in the foregoing opinion.

*United States Circuit Court. Southern District of New York.
In Equity.*

MARY E. BUNCE AND OTHERS v. JANE A. GALLAGHER AND
MICHAEL SMITH.

Where a person bought and took possession of a house under a forged deed, the true owner is entitled, on a bill in equity, to have the deed and the record of it declared void, and the deed delivered up to be cancelled, and the purchaser enjoined from assuming to sell the house to any one else.

It is not necessary that the title of the plaintiff should be established and possession obtained by an action at law.

The owner having in the trial of his complaint given the forged deed in evidence, is entitled to prove the forgery.

Where the holder of the legal title is a plaintiff, the misjoinder of other parties having an equitable interest will be disregarded unless the objection be taken by demurrer or answer before answer on the merits.

OPINION by

SHIPMAN, J.—The complainants are citizens of Connecticut and Massachusetts, and the respondents, citizens of New York. The bill is brought to obtain the decree of this court annulling and declaring void a certain alleged forged deed, and the record thereof, purporting to convey to the respondent Gallagher the title to a house and two lots of land situated on Staten Island, in the state of New York, and removing the cloud on the genuine title which this alleged forged instrument has thrown over it; and also to cancel a certain agreement entered into between the respondents for the sale and transfer of the premises in question to the respondent Smith, and to restrain them from consummating the same, or any similar contract.

Though the objects sought by the bill are simple, the facts and legal questions involved in the controversy are numerous and complicated. A detailed statement of the material facts is therefore indispensable to a clear understanding of the points to be decided. Mary E. Bunce, one of the complainants, is a daughter of the late John W. Bull, of Hartford, Connecticut. In September 1861, he gave her full power of attorney to transact all his business.

On the 4th of April 1862, she purchased for her father, under this power of attorney, the house which is the subject of this controversy, and took the deed in her own name. The consideration, however, came from his estate, and she held the property avowedly for his benefit.

This property, which lies in the town of Southfield, New York, was purchased subject to a mortgage, which was subsequently foreclosed, and a sale made by the sheriff of Richmond county. Mary E. Bull, assuming to act as her father's agent, under the letter of attorney, purchased in the property, and as before, and for the same reasons, and with the same object, took the deed in her own name. This sheriff's deed was executed March 20th 1863. Thus Mary E. Bull became invested with the legal title to this property by the two deeds referred to, both of which were duly recorded in the office of the clerk of Richmond county.

On the 9th of July 1863, John W. Bull died, leaving five children, viz., the four who have joined in this bill, and John W. Jr. He left a will, dated the 10th of May 1858, which was duly proved before the Court of Probate for the District of Hartford, July 15th 1863. One of the terms of this will was that all future acquisitions of real estate should be embraced in and pass by it. After a specific devise of the homestead of the testator in Hartford, with the furniture and movable property connected with it, to his two daughters, the remainder of his estate, real and personal, is given to the two daughters and sons who are named as complainants in this bill. Nothing was given, by the will, to the other son, John W. Bull, Jr.

On the 23d of May 1864, Mary E. Bull executed and delivered a deed of this property on Staten Island, together with other real estate therein described, to Henry R. W. Welch, one of the complainants in this bill, in trust. On the same day, Welch executed an instrument, purporting to be a declaration of the trust under which he received this deed from Mary E. Bull, and sets forth, so far as this property is concerned, that he holds it as trustee for all the devisees named in the will of John W. Bull, who are declared to be the equitable owners thereof.

On the 28th of May 1864, Mary E. Bull was married to Francis M. Bunce, who is also joined as a complainant in the bill.

In 1865, two instruments were found on record in Richmond county, describing the house and lots; one a mortgage purporting to be signed and acknowledged by Mary E. Bull, to secure the payment of \$1060 to Harriet G. and Louisa Moore, and dated December 15th 1863; the other an absolute deed, also purporting to be signed and acknowledged by Mary E. Bull, dated March

2d 1864, conveying the premises to Jane Ann Gallagher. Both these deeds were signed with the name of Mary E. Bull.

On the trial it was proved that these deeds had been executed by an impostor. She did not even resemble the genuine Mary E. Bull. She succeeded, however, in passing herself off as such, deceiving the counsel, to whom the genuine Mary E. Bull was a stranger, and obtaining the money of the Moores and of Mrs. Gallagher. The mortgage and deed were recorded in the clerk's office in Richmond county, and Mrs. Gallagher, with her husband, went into possession on the 14th of March 1864. Her husband subsequently died, but Mrs. Gallagher has continued in possession of the premises by herself and tenants till the present time. Among her tenants was Michael Smith, the other respondent in this bill, with whom Mrs. Gallagher entered into negotiations for the sale of this property to him.

Of course this mortgage to the Moores and the deed to Mrs. Gallagher are mere forgeries, and conveyed no title. The bill is brought to annul the deed to Mrs. Gallagher, to require her to deliver it up to be cancelled, and to declare the record of it void, and also to restrain her and Smith by injunction from consummating their negotiations for the sale of the property to him, and to prevent her from assuming to sell it to any one else.

There can be no dispute as to the facts. The proof is overwhelming that neither Mary E. Bunce (formerly Mary E. Bull) nor any one of the other complainants, nor any other person who had any right or title to this property, had any knowledge, or were in law chargeable with any knowledge of this pretended deed, or the possession of Mrs. Gallagher under it, until about a year after its execution and the entry of Mrs. Gallagher, who had been thus unwittingly made the victim of a fraud and imposture. The defence to the bill is therefore technical, and turns upon questions of law.

The respondents insist:—

1st. That this court has no jurisdiction, at least in the present state of things, as the complainants, or real owners, have adequate remedy at law, and must first resort to ejectment, and settle the title and obtain possession of the premises.

2d. That the bill should be dismissed for a misjoinder of parties complainant.

8d. That improper evidence was received on the trial, which, if rejected, leaves material allegations of the bill without proof.

We will consider first whether the complainants have adequate remedy at law in the just and proper sense of that term. This is important, inasmuch as the 16th section of the Judiciary Act provides, "That suits in equity shall not be sustained by either of the courts of the United States where a plain, adequate, and complete remedy at law can be had." It has been held that this provision is merely declaratory, and does not exclude the courts of the United States from any part of the field of equitable remedies: *Baker v. Riddle*, 1 Bald. 405; *Boyce v. Grundy*, 3 Peters 210. In the latter case Mr. Justice JOHNSON, in delivering the opinion of the court, uses this emphatic language: "This court has often been called upon to consider the 16th section of the Judiciary Act of 1789, and as often, either expressly, or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is remedy at law; it must be plain and adequate; or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." The question, then, arises whether the bill before us, on the general principles of equity jurisprudence, presents a case of equity jurisdiction. And it is proper to remark here that the fact that the deed in question is a void instrument does not take the case out of the jurisdiction in equity: *Piersoll v. Elliott*, 6 Peters 95; *Hamilton v. Cummins*, 1 Johns. Ch. R. 517. Numerous authorities might be cited in support of this doctrine, but it is not necessary in the present case, as the respondents' counsel concede the point. They, however, insist that before the complainants can come into a court of equity for the relief sought by this bill, they, or whoever is the legal owner, must establish title and obtain possession by ejectment at law. The argument at bar in support of this claim proceeded upon the assumption that the bill presented the case of a doubtful and disputed title, and that as courts of equity do not adjudicate simple questions of title to land, no relief can be granted. But this difficulty is not presented by the bill. There is no question of title involved between the complainants and the respondents, except that involved in the question whether the deed is forged or not. This forged deed has not impaired or

complicated the title to this land. It has thrown a cloud over it, especially as it stands on the records of lands in the county where the property is situated, and this cloud obscures the true state of the title, and is well calculated to lead to misapprehension, embarrassment, and mistaken litigation. As the invalidity of the deed does not appear on its face, but can only be made apparent by extrinsic evidence, it is peculiarly the duty of a court of equity to sweep it away. The case of *Ward v. Dewey*, 16 N. Y., cited by the respondents on the point, concedes this doctrine. PRATT, J., at p. 522, says: "But where such claim appears valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it as a cloud on the title. *The case of fraud in procuring a deed to be executed which apparently conveys the title* * * * is a familiar illustration." There is here no controversy about a doubtful title between these parties, and the question of possession has no legal relation to the object now sought to be attained by the decree of this court.

But it is said there is great doubt as to which of the complainants holds the legal title, and as the equitable power of the court can only be exercised in aid of the legal owner, the legal owner must be ascertained before the court can entertain jurisdiction. But this objection goes only to the question whether the proper parties have been made complainants in the bill. Some one is entitled to have this spurious and fraudulent deed which now clouds the title to this property swept off. Whether that right pertains to these complainants we will now consider, in disposing of the respondents' second main objection, viz., that there is an improper joinder of parties complainant.

As a general rule all the parties in interest should be joined in a bill either as complainants or respondents, whether these interests be equitable merely, or legal. While it is not always necessary to join all who have an interest in the subject-matter of the suit, those who have an interest in the object sought to be attained by the suit must be joined: Story's Eq. Plead., §§ 72-136 *et seq.* Those whose interests are in harmony, and only those, should be joined as complainants: *Saumerez v. Saumerez*, 4 M. & C. 336. Now, it is evident that the interests of all the devisees of John W. Bull, named in the bill, are in harmony. There is not only

no conflict or variance between these interests, but all these devisees are concerned in the relief which this bill seeks. This will be seen by recurring to facts already stated. Mary E. Bull purchased this property with her father's money, avowedly as his agent, taking the title in her own name solely as a matter of convenience and to enable her to transfer it with facility. She had been acting under a power of attorney given her by her father when he was competent to execute such an instrument. But at the time she purchased this property of Root, as well as at the time when the sheriff's deed was made to her, her father's mental powers had so far decayed as to render him incapable of legally transacting any business. The authority, therefore, conferred upon her originally by this letter of attorney was extinguished, or, at least, suspended, by his mental incapacity. This is well-settled doctrine, though it has been intimated that before the authority of an agent can be suspended by the insanity of the principal occurring after the execution of the power, the fact of lunacy must be established under an inquisition. Still, I apprehend, that whether the fact were formally established or not, the agent could not justify or support an act upon the authority originally given, done after the agent had knowledge of the incapacity of his principal: Story on Agency 481, note. But this question is not material here. Mary E. Bull evidently acted under the mistaken idea that the authority conferred upon her by the power of attorney was still in force. But, whatever her notion was, she acted in good faith, purchasing this property for and on account of her father, as she supposed, in the interest of his estate, paying for it out of his funds, and avowedly holding it for his benefit. She held the legal title, but the property in equity belonged to him. By his will, his equitable interests passed to his devisees, though one of them, the daughter, continued to hold the legal title. But it is objected that the four complainants, who are devisees under John W. Bull's will, are in no condition to maintain any suit touching real estate in the state of New York, because the will has never been proved and admitted to probate in the latter state.

But this suit ought not to fail upon a merely formal and technical point like this. Courts of equity are slow to dismiss suits for want of proper or the joinder of improper parties, where the difficulty can be remedied, or where they can give the relief sought without impairing or jeopardizing the interest of any one.

Rather than that the suit should fail, I should feel bound to withhold the decree until this supposed defect could be cured by a probate of the will in this state.

But in the first place it is doubtful whether it was indispensable for any one of these devisees, *as such*, to be joined as complainants. The holder of the legal title could maintain the bill without compromising any of the rights given by the will. But joining those who have equitable interests in the subject-matter would be unobjectionable, or at least, if the misjoinder is apparent on the face of the bill, it should have been taken advantage of by way of demurrer, or, at all events, by answer. Now the will of John W. Bull, the deed of Mary E. Bull to Welch, in trust, and the declaration in trust by the latter executed at the same time as the deed, are referred to in the bill and annexed thereto as exhibits. The alleged misjoinder was, therefore, apparent on the face of the bill, and should have been taken advantage of by demurrer.

Mr. Justice Story, in his Equity Pleadings, § 544, says, "In cases of misjoinder of plaintiffs, the objection ought to be taken by demurrer, for if not so taken, and the court proceeds to a hearing on the merits, it will be disregarded, at least if it does not materially affect the propriety of the decree." The bill shows that these devisees claim an interest in this property under the will of their father, who died in Connecticut, the place of his domicile, where his will was proved and his estate went into settlement. There is no allegation that the will was proved in New York. The misjoinder alleged is put upon the ground of want of interest, but this was apparent on the bill, and as it was not demurred to, must be deemed to have been waived: 4 Paige 510.

Certainly the court cannot regard it in the present stage of the suit, especially as this misjoinder, if it be one, in no way affects the propriety of the decree asked for, either as that decree may affect the interests of complainants or respondents.

But the propriety of making Mary E. Bull, one of the devisees, a party complainant, is not open to objection of any kind, for she holds the legal title to this property under the sheriff's deed to her. Her deed to Welch, on the 23d of May 1864, was void under the statute of New York. She was out of possession, though she did not know it at the time. Mrs. Gallagher was in

possession under color of title. The fact that the deed under which the latter claimed was void makes no difference. Her possession was adverse, for she was in actual personal possession; and the fact of possession and the *quo animo* of the possessor are the tests by which to determine the question whether the possession is adverse or not: *La Pomboir v. Jackson*, 8 Cow. 589. Mary E. Bull, therefore, has never parted with the legal title to this property. The only deed she has ever made was that to Welch, and that was void. She is therefore, beyond all question, a proper party to this suit.

Of course it follows that as Welch took no title to this property, he has no interest of any kind, and therefore should not have been joined. But this fact was apparent on the face of the bill, in connection with the fact of Mrs. Gallagher's possession, which was well known, of course, to her and Smith, her co-respondent. This objection should, therefore, have been taken in an early stage of the case. The respondents answered to the merits alone. They should have taken advantage of the misjoinder of Welch in their answer. (Lord LANGDALE, in the case of *Raffity v. King*, Vol. 6, Law Journal N. S. 93.) His misjoinder in no way embarrasses the respondents, nor can it in any manner affect the propriety of the decree. It will, therefore, be disregarded.

On the hearing the complainants exhibited the forged deed described in the bill, and proceeded to prove by Mrs. Bunce that the signature purporting to be hers was a forgery. They also offered Mr. Gardiner, who made the certificate of acknowledgment on the forged instrument, to prove that the person who executed it was not Mrs. Bunce, the real owner, although he supposed so at the time. To this evidence the respondents objected on the ground that it was not competent for the complainants thus to discredit papers which they had produced in evidence. But the rule upon which this objection rests has no application to a suit of this character. The complainants are no parties to these instruments, and are therefore at liberty to prove their spurious character.

Let a decree be entered in accordance with the prayer of the bill against both respondents. No costs will be allowed against the respondent Smith.

Supreme Court of North Carolina.

PHILLIPS v. HOOKER.

Confederate treasury notes were not an illegal consideration in contracts between citizens of the Confederate States, unless it was the *intent* of the parties to the contract *thereby* to aid the rebellion.

Therefore, where one citizen of North Carolina, in 1862, bought a house of another, paid for it in Confederate notes, and went into possession, the contract cannot be set aside by a court as founded on an illegal consideration.

IN 1862 the defendant agreed to sell to the plaintiff a house and lot, and received \$2500 in Confederate treasury notes as the consideration, and put him in possession. The contract had no special political significance, and there was no averment that it was entered into with an intent to give aid to the rebellion.

PEARSON, C. J.—The right of the plaintiff to relief does not rest alone upon the ordinance of the convention, or the act of the legislature, but upon the broad ground that the courts are bound to administer justice and enforce the execution of contracts.

The contract is to be taken as a dealing in the ordinary transaction of business. The plaintiff bought the house and lot because it suited him. The defendant took the Confederate notes because she needed funds.

It is said every dealing in Confederate treasury notes gave them credit and circulation, and consequently aided the rebellion; so every such dealing was illegal, and not fit to be enforced by the courts, without reference to the intent of the parties. The proposition is general; every man and woman who, in the ordinary course of business, received a Confederate note, did an illegal act, tainted with treason: it embraces all contracts, as well contracts executed as executory; for, if true as to one, it aims a blow at all dealings among our people during the war, and upheaves the foundations of society. I do not believe the proposition can be maintained by any authority or any principle of law.

1. It may be conceded that, if, at the outbreak of an insurrection, parties to contracts, *with a view of aiding the cause*, by giving credit and circulation to its paper, receive it as money in their dealing, such contracts are illegal.

But that is not the case under consideration.

In 1862 the contest had assumed the magnitude and proportions of war; each party in territorial limits had the boundaries of a mighty nation, and each party counted its people by millions. The "Confederate States" was recognised by the nations, and by the United States itself, as a belligerent power, entitled to the rights of war, and, in the exercise of its powers, it had issued paper as the representative of money, which included all other currency, and constituted the *only circulating medium of the country*. The government of the United States was unable to protect the people, and there was no currency but Confederate treasury notes. In this condition of things, was every man to stop his ordinary avocations and starve; or else be tainted with treason, and deemed guilty of an illegal act if he received a Confederate treasury note?

The Attorney-General of the United States, in his opinion on the subject of disfranchisement, uses this language: "Officers in those rebel states who, during the rebellion, discharged official duties not incident to war, but in the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion. The interest of humanity requires such official conduct in time of peace, and the performance of such duties can never be considered as criminal." Was a judge to cease to do those "duties required by the interests of humanity, the performance of which can never be considered as criminal;" or was he to perform the duties and starve, rather than commit an illegal act by *receiving his salary in Confederate treasury notes*? Was the merchant to close his store, the blacksmith and shoemaker to quit work, and the farmer to let his tobacco and surplus grain rot on his hands, and allow his family to suffer for clothing and the other necessities of life, or do an illegal act by receiving Confederate notes? Really, unless the receiving of such notes can be connected with a criminal intent to aid the rebellion, the question seems to me too plain to admit of argument. A naked statement exposes the absurdity of the proposition. The courts must act on the presumption that Confederate notes were received in ordinary dealing—not for the purpose of aiding the rebellion, but because there was no other currency.

2. Look at the subject in another point of view: At the close of the war the President granted amnesty and pardon to all, save a very few individuals. Congress in the act for reconstruction

disfranchised only those who, having taken an oath to support the Constitution of the United States, afterwards engaged actively in the rebellion, and has refused to enforce the rigorous measure of confiscation. On what principle, then, can it be, that the courts are called upon to take up the matter "at the little end," search into the private dealings of the people, and all the ramifications of ordinary business, and declare of no force—in effect *confiscate*—all contracts based upon the consideration of Confederate notes? What good can result from this action of the courts? It can have no effect upon the rebellion—for it is over. It can have no effect upon the future, for "necessity knows no law;" and whenever a condition of things occurs in which the people must use the only currency, it will be used. The idea of the courts assuming the duty of preventing civil wars by holding that it is illegal to receive the paper of rebels, in ordinary business transactions, when there is no other currency—that such contracts are not fit to be enforced—presents to my mind a palpable absurdity. So, what good will be done by this action of the courts? None, save only to show, on the part of the courts, a detestation of treason, by treading on the extremities of the monster after it is dead.

8. In *Blossom v. Van Amringe*, 1 Phil. 183, the maxim *ex turpi causa actio non oritur*, was pressed on the court, and it was insisted that, as the parties had made a transfer of property, in *fraud and deceit, with an intent to evade* the confiscation acts of the government of the Confederate States, the case fell under the maxim. The court says: "The objection would no doubt have been fatal, if taken before a court of the *de facto* state government, while it formed a part of the Confederate states; but this court is a co-ordinate branch of a rightful government, forming a part of the United States, and cannot entertain such an objection." In our case the matter is reversed. The turpitude, if any, was aimed at the United States, and the maxim applies, provided there be the criminal intent. That is the question. I deny the intent; there is no evidence of it or anything from which it can be implied. It cannot be held that the mere receiving a Confederate note was illegal and base, without involving in the imputation of baseness every man and woman in the state. The minister of the gospel, the judge, who received their salaries; the physician, the merchant, the mechanic, the farmer, who car-

ried on their ordinary business. The poor seamstresses, who at the end of the day received their hard-earned wages, were all guilty of an act so base that the doors of the courts of justice must be shut against them. The proposition is monstrous. During the war a farmer should not have made more grain than enough to support himself and family: making a surplus was illegal—it aided the rebellion. If every man had quit work, the rebel army could not have been sustained; the war would have stopped by starvation. We were told in the argument that ‘gold as well as iron is a sinew of war.’ It may be added, *meat and bread* are also sinews of war—*reductio ad absurdum*.

4. But it is said, the consequences of holding all such dealing to have been illegal, will not be so grievous after all, for in its practical application, the maxim will only make void *executory contracts*. The principle, if a sound one, evidently includes all contracts, executed as well as executory, and the admission that in practice it can only be made to reach the latter, demonstrates the impotence and absurdity of this action of the courts, as the *means* of putting a stop to *civil wars*. Let us see how it is to operate: A man buys a tract of land, pays for it in Confederate notes and *takes a deed*. The court cannot reach him, for it is met by the “*in pari delicto melior est conditio defendentis*,” so he keeps the land, not because he is innocent, but because the court cannot take it from him and restore it to the original owner, for he is equally guilty. If one has paid off a bond in Confederate notes, whether the creditor will be allowed to sue on the *original debt*, which is not tainted with this “*turpi causa*,” is a problem that I will not undertake to solve.

But suppose the bond is only paid in part; the payment must be rejected, for, being in Confederate notes, it is of no more legal effect than if made in counterfeit money; or suppose in our case Mr. Hooker brings ejectment for the land; the contract has been in part performed, and the defendant is in possession, will the court shut its doors against her on the maxim *in pari delicto*? In short, is the practical application of this novel principle to be allowed to cover all intermediate cases, when the contract has not been fully executed; or is it to be confined to contracts wholly executory, where the purchaser has paid the price, but in the simplicity of his innocence has neglected to take a deed, and has not even taken possession? The amount of it is, all who required

the Confederate notes to be paid down or who have taken deeds and acquittances *under seal*, although equally guilty, are to go unpunished, and only those who gave credit to their neighbors or who neglected to take deeds are to be made victims to the vengeance of the law, while the remiss debtors and dishonest vendors are to be the sole gainers, although equal participants in the illegal acts. Lame and impotent conclusion.

Thus encouragement is to be given to dishonesty, justice is not to be administered, and the people of the country are to be involved in utter perplexity and confusion in order to make a useless show of zeal on the part of the courts "to punish rebels."

READE, J.—I propose to consider only so much of the case as involves the question whether Confederate treasury notes, which were paid for the land, were an illegal consideration. For, very clearly, if the consideration was illegal, the contract will not be enforced in this court. I shall treat it as a *dry legal question*.

A contract is not void merely because it *tends* to promote illegal or immoral purposes: Hilliard on Sales 376; *Armstrong v. Toler*, 11 Wheat. 258; Story's Conflict of Laws 258.

A contract for the sale of a house and lot is not vitiated by the fact that the vendor knows, at the time of making it, that the vendee intends it for an immoral or illegal purpose: *Armfield v. Tate*, 7 Ired. 259.

A sale of goods is not void although the seller knows that they are wanted for an illegal purpose, unless he has a part in the illegal purpose: *Hodgson v. Temple*, 5 Taunt. 181. In which case MANSFIELD, C. J., says: "The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of his payments." In *Dater v. Earl*, 3 Gray (Mass.) 482, the court says: "If the illegal use to be made of the goods enters into the contract and forms the motive or inducement in the mind of the vendor or lender to the sale or loan, then he cannot recover, provided the goods or money are actually used to carry out the contemplated design; but bare knowledge on the part of the vendor that the vendee intends to put the goods or money to an illegal use will not vitiate the sale or loan, and deprive the vendor of all remedy for the purchase-money."

Where goods are bought from an enemy, even in his own terri-

tory, by a citizen of the United States, the sale is valid, and the price may be recovered, although the act might be a misdemeanor and the property liable as a prize: *Coolidge v. Inglee*, 13 Mass. 26. Authorities are abundant to the same effect.

It will be seen, therefore, that a contract is not void because there is something immoral or illegal in its surroundings or connections. And yet it is equally certain that a contract is void when the consideration is illegal or immoral. What, then, is the criterion? Probably the following cases will show the dividing line: Goods were sold to a man who intended to smuggle them and defraud the revenue, and the vendor knew of the design; it was held that the contract was valid, and the vendor could recover the price: *Holman v. Johnson*, Cowp. 341. But goods were sold to a man who intended to smuggle them and defraud the revenue, and the vendor not only knew of the purpose, but put them up in a particular manner so as to enable it to be done; it was held that the contract was void, and that the price could not be recovered: *Briggs v. Lawrence*, 3 Term Rep. 454. Now what is the difference between the two cases? None, except that in the latter case it was a part of the arrangement, and entered into the *intent* of the parties that the thing should be done. All these authorities show that the *intent* of the parties to accomplish the illegal thing is necessary to vitiate the contract; and therefore, in the case before us, unless the intent of the parties in their contract was to aid the rebellion, the fact that it did it (if it did) by giving currency to the notes, does not vitiate it.

It is not pretended that the Confederate treasury notes were of *no value*. It is conceded that they were of value, and that, at the time of the sale in 1862, less than two dollars of the notes would buy one dollar of gold. But it is contended that although of value they were *illegal*. In what sense were they so? In no case can the thing used as a consideration, of itself and independent of the intention of the parties, invalidate the contract if the thing be of value, unless, perhaps, by express statute. There is nothing which may not be turned to mischief in its use, as poisons, deadly weapons, and the like; but still they are sufficient considerations to support contracts, unless it be the *intent* of the sale to do mischief. The case of *Randon v. Toby*, 11 How. 493, is very strong in point. In that case Africans had been imported and sold as slaves, which is forbidden by law. The vendor brought

suit for the price of one which he had sold ; and the defence was that the consideration was illegal. The court says : " The plea that the notes were given for African negroes imported into Texas after 1838 is unavailable. On the argument here, it was endeavored to be supported on the ground that the notes were void, because the introduction of African negroes into Texas was contrary to law. If these notes had been given on a contract to do a thing forbidden by law, undoubtedly they would be void. Neither of the parties had anything to do with the original contract, nor was their contract made in defiance of law. The crime committed by those who introduced the negroes into the country does not attach to those who may afterwards purchase them. As respects the defendant, therefore, he has received the full consideration of his notes." And then follows this strong language by the court : " If the defendant should be sued for his tailor's bill, and come into court with the clothes made for him on his back, and plead that he was not bound to pay for them because the importer had smuggled the cloth, he would present a case of equal merits and parallel with the present ; but he would not be likely to have the verdict of the jury or the judgment of the court."

So, in the case before us, it is conceded that it was illegal to issue the treasury notes, just as it was illegal to import the negroes ; but the illegality is in the *issuing* in the one place, and in the *importing* in the other, and does not attach to those who afterwards use the thing issued or imported. It was insisted, in the argument before us, that the value of the treasury notes depended upon their circulation, and that the parties, by using them in their contract, aided in their circulation ; so, in the case just quoted, the value of the importation of negroes depended upon their sale, and the transaction between the parties aided their sale, and, in that way, encouraged importation. The fact was undoubtedly true, yet it did not render the contract void. The illegality consisted in their importation and not in their use after importation ; so the illegality consisted in the issuing of treasury notes, and not in their use after they were issued. If balls, which had been shot in battle, had been found and sold, it might as well be said that the consideration was illegal, because they had been made for, and used in, the rebellion. In *Coolidge v. Inglee, supra*, the case was that in the war of 1812, a citizen

of the United States bought goods of the enemy contrary to law, and brought them to the United States and sold them, and, when he sued the purchaser for the price, he set up the defence that it was unlawful for the plaintiff to have bought the goods, and that, therefore, the consideration of the contract was illegal; but the court held the contrary. It is absurd to suppose that the goods in that case, or the treasury notes in this, were illegal. Were not the goods precisely the same as if they had been bought of a friendly power? Certainly. The *goods* were not illegal, but the *trading* with the enemy was.

This is the first time that this very important question has come before us for consideration. It has been well argued and patiently considered. We are not without important aid in determining the question. It was well considered by the convention of 1865, and the legislatures which have since assembled. The convention was prompt to declare that the rebellion, and everything in aid of it, was illegal. And it declared void all contracts which were in aid of it; but it did not declare void all contracts, the consideration of which were Confederate treasury notes; on the contrary, it plainly declared such contracts valid; that all contracts made during the war shall be deemed to be payable in money of the value of said notes; and directed the legislature to prepare a scale to show, not that said notes were of no value, but to show what their value really was. And the legislature did prepare such a scale. Now, if the defence set up in this case be good, then the convention and legislatures ought to have made short work of it, and declared that all contracts should be deemed to be payable in Confederate treasury notes; and that such notes were illegal as a consideration to support a contract, and, therefore, that all such contracts were void. I do not consider the question whether the convention or the legislatures had the power to validate or invalidate contracts, but their actions are cited to show that those bodies regarded these notes as valuable, and considerations to support contracts. We thus have the concurrent opinions of the judiciary, the convention, and the legislature of the state, and an uninterrupted train of decisions both in England and the United States on kindred subjects, that Confederate treasury notes are not illegal considerations in contracts between citizens, unless it was the *intent* of the parties to the contract *thereby* to aid the rebellion.

Our attention was called to an abstract of a case decided in Tennessee, in which Confederate treasury notes were held to be an illegal consideration. We regret that we have not the case at large. It seems to have been decided upon the ground that it was the money of rebels. Suppose it had been the coin of rebels. Doubtless there is some better reason than that. It would be an encouragement to rebels and to rebellion to exonerate them from a performance of their contracts because of their participation in so great a mischief. If the judiciary could be influenced at all by this consideration, it would hold them to a more rigid performance of all their undertakings. As a court, we neither favor or oppress rebels, but hold the scales of justice even. But we forbear further comment, lest we do our sister court injustice.

Court of Appeals of New York.

RICHARD P. BRUFF, EXECUTOR, v. HIPPOLITE MALI AND OTIS P. JEWETT.

In a suit by a purchaser of stock against the president of a corporation to recover the value of stock fraudulently over-issued by him, the plaintiff must prove that the certificates purchased by him did not represent genuine stock.

The plaintiff having proved that his certificates were issued after the entire stock authorized by law had been taken and certificates issued therefor, the burden was then shifted to the defendants to prove that plaintiff's stock was issued on the surrender or transfer of genuine stock.

Unless this evidence clearly and indisputably establishes the genuineness of plaintiff's stock, the question should be submitted to the jury.

The authentication of certificates of stock by the president of a corporation by his signature in the usual mode, is equivalent to a continuing and renewed guarantee to successive purchasers, that the stock is genuine, and the plaintiff is not bound to prove that he purchased his certificate directly from the president or the company.

THIS was an action brought by Shotwell, since deceased, and now prosecuted by his executor, substituted as plaintiff in the cause.

A recovery was had against Mali and Jewett, former president and vice-president of the Parker Vein Coal Company, a corporation created by the laws of Maryland, having its principal place of business in New York.

The complaint contained three separate counts or causes of action. In the first, after an averment that the plaintiff was a stockholder, it was charged that the defendants misconducted in their office of president and vice-president, and wrongfully and fraudulently over-issued the stock of the company, by reason of which the plaintiff's stock was rendered unsaleable and valueless. In the second, it was charged that the defendants made false and fraudulent representations in regard to the financial affairs of the company, whereby the plaintiff was induced to purchase stock of the company which in fact was valueless. In the third, it was averred that the defendants, as officers of the company, and after the whole amount of the capital stock had been issued, made and issued other certificates purporting to be genuine certificates of shares of the capital stock of the company, which were false and fraudulent, and sold and disposed of the same as true and genuine stock; 480 shares of which the plaintiff purchased and received as genuine, to his great damage.

The recovery was under the third count, and the questions presented to this court for examination arose under the appeal by the defendants from the judgment having its basis on that count.

The opinion of the court was delivered by

BOCKES, J.—It may be well to examine the case in the order in which the questions arose on the trial. It was not disputed that the defendants, Mali and Jewett, were officers of the company. Both were directors, the former its president and the latter its vice-president. Nor was it controverted before the court on the trial, that after the whole capital stock was filled and certificates for the entire amount issued, the defendants without authority continued to make further and over-issues to an erroneous and ruinous amount. It was proved, or there was evidence tending to prove, that the fraudulent or over-issues were made prior to the time when the plaintiff made his purchases, and prior to the date of the certificates of stock issued to them—in small numbers at first and afterwards freely—and that the over-issues were made by the defendants deliberately, from time to time, as inducements were suggested. The authorized capital stock was \$3,000,000. The spurious stock, from over-issues, exceeded \$12,000,000.

Under this state of facts the plaintiff rested the case, and the defendants moved for a dismissal of the complaint. The judge remarked in substance, that it appeared from the evidence that the plaintiff's certificates of stock were issued after the stock was full and over-issues had commenced, and that, in the absence of evidence that the certificates were given on the surrender of stock, it was for the jury to say whether they were genuine; and he denied the motion. This ruling was manifestly correct. The genuine certificates were all out before those obtained by the plaintiff were issued. There was no proof then that any of the genuine certificates had been surrendered and new ones issued in their place. It might well be that there had been, but there was no proof of it in the case. There was only a suspicion growing out of a probability, because the stock, or what purported to be the stock, of the company had been in the market.

Thereupon evidence was given by the defendants to the effect that, from a time prior to the purchase by the plaintiff of his stock, there were surrenders and transfers of certificates to a very great extent daily at the office of the company. But the witness was unable to say whether such surrenders and transfers were of the genuine or spurious stocks—at least he did not identify a single transaction of the kind where the stock was issued prior to the issuing of the spurious certificates; and in regard to the certificates held by the plaintiff, he said it was impossible for him to say whether they were issued on the sale of stock for cash, or whether they were issued on the surrender of other certificates—that it would be a mere presumption for him to state. The judge was then requested to hold and to instruct the jury that there was not sufficient evidence to warrant a finding that the stock in question was not genuine—which he declined to do. This decision was also correct. It was very doubtful whether the case was materially changed from what it was when the plaintiff rested.

Did the evidence given by the defendants clearly and indisputably establish the fact that the plaintiff's certificates were genuine, or were issued on a surrender or transfer of genuine stock? Certainly not, and if not, then the question still remained for the jury, and it would have been error to have instructed them as requested.

Even if the case had been changed by the defendants' evidence,

unless made entirely certain in their favor, it would still remain for the jury to say what effect should be given to the evidence—especially if it was to a considerable degree a matter of opinion or reasoning—and also to what extent a change had been effected by the proof. All that the defendants could rightfully claim, as regards this point, was that the judge should charge, as he did do, that, to entitle the plaintiff to recover, he was bound to prove to the satisfaction of the jury, that the certificates bought by him did not represent genuine stock, or any part of the stock of the company, but constituted part of the over-issue, not authorized by its charter. There was evidence before the jury bearing strongly on this question. The entire stock of the company had been taken, and certificates therefor issued; after which, and prior to the purchase by the plaintiff, the defendants had commenced their system of false issues.

The plaintiff's certificates certainly belonged to the class of spurious issues, unless genuine ones had been surrendered and new ones sent out in their place.

The burden was on them to remove the inference deducible from these facts; and this they could have done by showing that the plaintiff's certificates were issued on the surrender, or on the transfer of genuine stock. This might be difficult, but if so, or even if actually impossible, the defendants should not be heard to complain, when their own admitted culpability creates the dilemma.

No error occurred in the admission or rejection of evidence; none was admitted against objection bearing on the question submitted to the jury; nor was any excluded to which the defendants were entitled. They were allowed to prove that the plaintiff voted, or authorized some one to vote on his stock, as some evidence bearing on the question of its genuineness. But the offer to show that the directors of the Parker Vein Coal Company, with the consent of the plaintiff, transferred the property of the company to the American Coal Company, and accepted the stock of the latter in exchange for the stock of the former, and that the plaintiff took stock in the latter under this arrangement, was properly rejected. Those facts had no tendency to prove that the plaintiff's certificates represented the genuine stock of the original company. How he disposed of the stock did not prove it

genuine or otherwise. This was a matter with which the defendants had no concern. Their liability was complete, if liable at all, at the time of the purchase by the plaintiff.

The case, having been properly sent to the jury, and the jury having found in favor of the plaintiff, must now be further examined, on the hypothesis that the plaintiff's certificates did not represent the genuine stock of the company, but were spurious. In this view the defendants asked the judge to charge the jury as matter of law, that, even if spurious, there was no evidence that the certificates in question were purchased from the defendants, or from the Parker Vein Coal Company, and that, if not purchased from either, then they were not liable in this action. These requests, and the refusal of the judge so to hold and charge, present the only remaining question of importance pressed on our consideration.

The learned judge instructed the jury on this point as follows : "That there was no evidence that the certificates were purchased from either the defendants or the company, but that it was unnecessary for the plaintiff to prove that he purchased from either ; that if the defendants issued the stock, and the plaintiff purchased it on the faith that it was genuine, authenticated as it was, the defendants were liable, although the actual purchase was made of others." It is undoubtedly true that a vendor of property guilty of a fraud on its sale, or who sells with warranty, is liable only to his vendee.

A subsequent purchaser acquires no right of action therefor. As was well stated by the court below, there is in such case no privity between the vendor and such subsequent purchaser. But is such this case ? Let us see clearly what facts must be deemed established by the verdict of the jury.

The verdict is general for plaintiff, and every intendment is in favor, both of its correctness and completeness, to sustain the recovery. The jury have found that the certificates of stock purchased by the plaintiff were spurious ; that the defendants issued or caused them to be issued with a fraudulent purpose, and that the plaintiff purchased them in good faith, supposing them to be genuine ; that is, supposing them truly to represent a part of the capital stock of the company. That they could not be enforced or employed as stock—in other words, that they gave the pur-

chaser no rights as stockholders, is decided in *The N. Y. and N. H. Railroad Co. v. Schuyler*, 84 N. Y. 30. These false certificates were sent forth by the defendants—were thrown into the market by them, as was said in this case cited, “with a view to well-known and established commercial usages.” They authenticated them, falsely and fraudulently attested them as genuine. They bore on their face such false attestation, which was equivalent to an assertion on their part to all persons who should purchase, or to whom they should be offered, that they were genuine. In this way they invited confidence and induced trade. These acts were done with the intent to defraud any and all purchasers, well knowing that every person to whose hands these false certificates should come by fair purchase might be injured. Wherefore, having authenticated and issued these certificates for the purpose of defrauding, the defendants should be held liable to any one sustaining damage by purchasing on the faith of their genuineness. In this view the defendants are to be considered as acting directly upon and influencing the purchaser; and of course liable, as every tort-feasor is, for the damages occasioned by their wrongful act. It was held in the *N. Y. and N. H. Railroad case*, above cited, that every *bonâ fide* holder of spurious certificates (issued as were those of the plaintiff here) had a right of action against the company for negligence, in permitting its officer and agent to perpetrate a systematic course of fraud, like that proved in this case. It mattered not how many transfers had been made. If the certificates had their origin in the fraudulent or over-issues, they were void, and the *bonâ fide* holder had his claim against the company for damages occasioned by the fraudulent act of its agent, and in such case a joint action will lie against principal and agent: *Phelps v. Wait*, 30 N. Y. 18; or a separate action against either: *Suydam v. Moore and Losee*, 8 Barb. 358. The wrongful act is the servant's in fact, and the principal's by construction. So the rule which held the company liable in the *N. Y. and N. H. Railroad case* to *bonâ fide* holders of the spurious certificates would certainly have held Schuyler, the agent who perpetrated the fraud, also liable. It was also decided in this case, that to entitle a party holding spurious certificates to sue, no privity was necessary, except such as was created by the unlawful act, and the consequential injury. (See also *Gerhard v. Bates*, 20 Eng.

L. & Eq. 129). In *Thomas v. Winchester*, 6 N. Y. 397, the action was for negligence, charging the defendant with carelessness in labelling a deadly poison as a harmless medicine, and sending it so labelled into market. The poison was sold by the defendant to Aspinwal, and by Aspinwal to Foord, and by the latter to Thomas, the plaintiff, who administered it to his wife. The objection was taken that the action could not be sustained, as the defendant was a remote vendor of the article; and there was no connection, transaction, or privity between him and the plaintiff, or either of them. The objection was not sustained, and it was held that the defendant was liable for improperly and negligently labelling the poison as a harmless medicine and sending it forth into market so labelled.

The defendant would have been none the less liable, if the illegal act had been intentional and wilful, instead of negligent merely. It necessarily follows, from the doctrine established by the above cases, that the defendants, having issued the false certificates of stock, authenticated by them as genuine, and cast them upon the market with fraudulent intent, are liable to every holder to whose hands they may come by fair purchase. The learned judge was right, therefore, in refusing to charge as requested. We are referred to the case of *Seizer v. Mali*, 32 Barb. 76, as an authority against the theory adopted by the judge at the Circuit. It will be seen, however, from the views above expressed, that the principles recognised in *Seizer v. Mali* are not here at all impugned. But we are of the opinion that they were not there well applied. The same question was discussed in *Cazeaux v. Mali*, 25 Barb. 578, by Mr. Justice MITCHELL, whose views and conclusions are approved.

All concurred in the above opinion except HUNT, J., who dissented, and PARKER, J., who gave no opinion.

Judgment affirmed.

THE CONSTITUTIONALITY OF THE CONCLUDING EXEMPTION CLAUSE IN THE BANKRUPT ACT.¹

A WRITER in the October number of the Register, over the signature of S. E. B., argues that the provision of the Bankrupt Law which adopts the exemptions made by the laws of the respective states, is void for want of uniformity.

But I venture to suggest that he has overlooked the proviso which is attached to this provision:—

“Provided that the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees, and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act.”

When the effect of this proviso is considered, it is obvious that if that part of the law which it qualifies is pronounced unconstitutional, “the other and principal provisions of the law would, without doubt,” fall with it.

The authority cited, 2 Gray 98, lays down the rule, “When the parts of the statute are so mutually connected and dependent as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, if some parts are unconstitutional and void all the provisions which are thus dependent, conditional, or connected must fall with them.”

The proviso referred to was drawn with the distinct purpose of bringing the law within this rule, so that if the state exemptions clause should be held void the whole law would fall with it.

The passing title of the bankrupt's property to the assignee is one of the two great objects which the law has in view, the other is the bankrupt's discharge. If either of these objects cannot be effected all the other parts of the law must fail, because their only office is to effectuate these two objects. Now the language of the proviso is that the title of the bankrupt to the excepted property shall not pass to the assignee nor be impaired or affected “*by any of the provisions of this act.*”

¹ On the principle of hearing both sides, but without intending to get into any controversy, we give place to the following communication on a subject just now of prominent interest to the profession.—EDS. AM. LAW REG.

To hold that this excepted property can pass to the assignee in the face of this language, is to do violence to the intent and to the letter of the law.

This proviso was intended to be and is a "condition, consideration, and compensation" for those parts of the law which provide for involuntary bankruptcy, and I hazard nothing in saying that without the proviso the law would never have been enacted.

If it shall be held that it is necessary for this exempted property to pass to the assignee to make the law uniform, it is obvious that no property can pass, for if a court should hold that property can pass to the assignee which the distinct terms of the law say shall not pass, it would be judicial legislation of the worst character. It would be repealing an express provision of law and substituting one of a directly opposite meaning. J. C. S.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF MASSACHUSETTS.²

SUPREME COURT OF NEW YORK.³

SUPREME COURT OF PENNSYLVANIA.⁴

ASSUMPSIT.

Implied Promise to pay for Board or Services.—The law will not imply a promise to pay for board or services, as among members of the same family and persons more or less intimately or remotely related, where they are living together as one household, and nothing else appears: *Wilcox, Administratrix, &c., v. Wilcox*, 48 Barb.

BAILMENT.

Time of Delivery.—A dyer received from a customer goods to dye and gave this ticket: "H. J. Lance, dyer and scourer, Nos. 132 and 137 Third Street, Pittsburgh, Pa.—No goods delivered without return of this ticket—good for one year—No. 672—price \$1.50." *Held*, that the contract for delivery was not binding after the year: *Lance v. Griner*, 53 Penna.

¹ From J. W. Wallace, Esq., Reporter; to appear in 5 Wallace's Reports.

² From Hon. Charles Allen, Reporter; to appear in Vol. 13 of his Reports.

³ From Hon. O. L. Barbour, Reporter; to appear in Vol. 48 of his Reports.

⁴ From P. F. Smith, Esq., State Reporter; to appear in 53 Pa. State Rep.

Right of Bailee to Damages for Injury to Property.—One in the possession of and using property as a bailee for hire, may recover damages for an injury thereto: *Bliss v. Shaub*, 48 Barb.

BLOCKADE. See *International Law*.

BREACH OF PROMISE.

Rule for Damages.—In an action brought by a woman for breach of promise of marriage, no special damages were alleged in the declaration, but the judge instructed the jury that, in estimating the damages, they might take into view the money value or worldly advantages, separate from considerations of sentiment and affection, of a marriage which would have given her a permanent home and an advantageous establishment; and that, if her affections were in fact implicated, and she had become attached to the defendant, the injury to her affections was to be considered as an additional element of damages; and that they might take into consideration generally whatever mortification and pain of mind she suffered resulting from a refusal by the defendant to fulfil his promise. *Held*, after verdict for the plaintiff, that the defendant had no ground of exception: *Harrison v. Swift*, 13 Allen.

CONDITION.

What will amount to Condition at Common Law, breach of which will incur Forfeiture.—Whether words in a devise constitute common-law conditions annexed to an estate, a breach of which or any one of which, will work a forfeiture, defeat the devise, and let in the heirs, or whether they are regulations for the management of the estate, and explanatory of the terms under which it was intended to have it managed, is a matter to be gathered, not from a particular expression in the devise, but from the whole instrument: *Stanley v. Colt*, 5 Wall.

The word *provided*, though an appropriate word to constitute a common-law condition, does not invariably and of necessity do so. On the contrary, it may give way to the intent of the party as gathered from an examination of the whole instrument, and be taken as expressing a limitation in trust: *Id*.

Ex. gr. Where a testator devised real estate to an ecclesiastical society for its use or benefit: "*Provided*, that said real estate be not hereafter sold or disposed of," and in connection and continuation added numerous minute directions in the nature of regulations for the guidance of trustees whom he appointed to manage it, and with a view to the greatest advantage of the society. *Held*, that the latter being to be regarded as mere limitations in trust, the former was a limitation in trust also; not a common-law condition: *Id*.

CONSTITUTIONAL LAW.

Forfeiture of Citizenship for Desertion under Act of Congress.—The Act of Congress of March 3d 1865 imposes forfeiture of citizenship and its rights, as an additional penalty for the crime of desertion; it is therefore highly penal and must receive a strict construction in favor of the citizen: *Huber v. Reily*, 53 Penna.

Every new refusal of a drafted man to render service, is a public

offence, for which Congress may impose a penalty, and the Act of 1865 is not *ex post facto*: *Id.*

The power to determine who shall or shall not be a voter in a state belongs to the state itself, and the Constitution of the United States gives Congress no power to prescribe the qualifications of electors in the states: *Id.*

Congress may deprive a citizen of the opportunity to enjoy a right belonging to him as a citizen of a state, even the right of voting, but cannot deprive him of the right itself: *Id.*

Congress may as a penalty, impose upon a criminal, forfeiture of his citizenship of the United States, and if the constitution of a state allows, only citizens of the United States to vote, Congress may thus affect the number of votes: *Id.*

The Act of Congress of 1865 is not an attempt to prescribe the qualifications of voters in a state; it merely punishes the offender for violating the federal law, by depriving him of his citizenship of the United States: *Id.*

"Due process of law" ordinarily includes a complainant, a defendant, and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of proceeding: *Id.*

A judge of election or board of election officers is not a judicial tribunal to ascertain the guilt of a public offender, and a trial before such officers is not "due process of law:" *Id.*

It is not "due process of law," where the judgment is not final, and leaves the accused exposed to another trial in another tribunal: *Id.*

The Act of 1865 is one of a series of acts respecting the crime of desertion, and must be interpreted with them all in view: *Id.*

The Acts of Congress relating to desertion all contemplate a regular trial and conviction prior to inflicting a penalty, and courts-martial are constituted for such trials: *Id.*

The 21st section of the Act of 1865 refers to pre-existing laws relating to desertion, with the single object of increasing the penalties, but does not change or dispense with the machinery for punishing the crime. It is to be read as if incorporated into the former acts: *Id.*

The forfeiture prescribed must be *adjudged* to the convicted person, after trial by a court-martial and sentence approved: *Id.*

A citizen drafted into the service of the United States, who had notice but refused to report and was registered as a deserter, under the Acts of Congress, is nevertheless entitled to vote, unless he has been convicted of desertion by a court-martial: *Id.*

CONTRACT.

In restraint of Trade.—A contract made between citizens of this Commonwealth, by which one of them agreed, for a good consideration, never to "set up, exercise, or carry on the trade or business of manufacturing and selling shoe-cutters at any place within the Commonwealth of Massachusetts," is illegal, as being in restraint of trade; although the manufacture of shoe-cutters is an art which can only be carried on by persons instructed in the same, and at the time of making the above contract the person so promising was ignorant of said art, and his said

promise was made as a part of an agreement of partnership with one who was skilled and actually engaged in carrying on the same, and to take effect at the expiration of the partnership, and although at that time only three other persons were engaged in the business: *Taylor v. Blanchard*, 13 Allen.

CORPORATIONS.

Denial of Legal Existence.—In an action by a banking association organized under the Act of Congress, the defendant has a right to deny, in his answer, the legal existence of the plaintiff as a corporation; but an issue of that kind should not be tried by affidavits on motion; *The National Bank of the Metropolis*, 48 Barb.

DAMAGES.

Interference of Vendor with Performance of Contract by Vendee.—Morgan sold to Negley coal, with privilege to change a railroad on Morgan's land. Negley commenced the road, but at Morgan's suit was restrained by an injunction which was afterwards dissolved. Negley, without constructing the road, sold to another and brought suit on the injunction bond. *Held*, that the difference between the cost of constructing the road when the injunction was laid and when it was dissolved, was speculative and consequential, and improperly submitted to the jury: *Morgan v. Negley*, 53 Penna.

Had the property continued in the hands of Negley and had he finished the road at an increased cost, it would have been a proper subject for damages: *Id.*

DEBTOR AND CREDITOR.

Creditor's Bill—Other Creditors may come in without formal Order.—The practice of permitting judgment-creditors to come in and make themselves parties to a creditor's bill, and so obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled. And a proceeding of this sort will not be reversed because the party so coming in has not obtained an order of court to come in; the want of such order not being objected to and the proceeding having gone on to its conclusion as if it had been obtained: *Myers v. Fenn*, 5 Wall.

Semble, that in Illinois, in the case of a perfectly fair assignment for the benefit of creditors, where the trust will give considerable trouble, and property assigned is of a sort that little or no cash will pass into the hands of the assignee, a payment by the debtor previously to the assignments being made, of a certain sum on account of commissions, need not of necessity vitiate the assignment: *Id.*

Right to prefer Creditors—Transfer of Property for Payment of Debts.—A man confessedly in embarrassed circumstances, and, as the result shows, insolvent, seeing that a firm of which he is a member must probably fail, may lawfully appropriate his private property to the payment, primarily, of his private debts, in preference to the partnership debts, by conveying and transferring such property to his private creditors, in payment of their just demands; and such conveyances and transfers will be valid; where there is nothing to impeach the good faith of the grantees or tending to show that they were privy to any con-

concealment or fraudulent intent or purpose, on the part of the grantor, in disposing of his property: *The Auburn Exchange Bank v. Ritch et al.*, 48 Barb.

An individual may, at all times, convey or turn out his property in payment of his just debts; and this is none the less true because he is straitened in his circumstances and unable to pay all his creditors. At such times he may honestly prefer one creditor to another; and if he sells and conveys his property for a fair price, in payment of just debts, the legality of the conveyances or transfers cannot be questioned. Fraud cannot be predicated upon such a transaction, on the assumption that the debtor meant to defraud his creditors: *Id.*

The law is not so unjust as to forbid a son from paying an honest debt to his mother, by a conveyance to her of his family residence; nor is it so unreasonable as to require her to turn her son into the street, at the peril of losing the estate: *Id.*

Fraudulent Intent of Grantees.—An intent on the part of the grantees to defraud, or to concur in, or aid in carrying out or consummating any fraud on the part of the grantor, cannot be imputed or inferred from the fact that such grantees did, in fact, receive transfers of all the property of the grantor, and must have known that his other creditors could not be paid: *Id.*

DEED.

Delivery—Recording.—Where a deed to A., though executed before a mortgage of the same property to B., is not delivered until after the execution and record of the mortgage, the mortgagee will take precedence of it: *Parmelee v. Simpson*, 5 Wall.

The placing of a deed to a party on record, such party being wholly ignorant of the existence of the deed, and not having authorized or given his assent to the record, does not constitute such a delivery as will give the grantee precedence of a mortgage executed between such a placing of the deed on record and a formal subsequent delivery: *Id.*

As a general thing a ratification of a grantor's unauthorized delivery can be made by the grantee; but not when the effect would be to cut out an intervening mortgage for value: *Id.*

EASEMENT. See License.

ENLISTMENT.

Discharge from—Habeas Corpus.—Congress has power to pass an act prohibiting the state judges from interfering with enlistments in the army or navy upon *habeas corpus*: *In the matter of O'Connor*, 48 Barb.

The Acts of Congress of February 1862, and of February and July 1864, conferring upon the secretary of war the authority to discharge enlisted minors, upon certain terms and conditions, are to be construed as having provided a mode by which persons improperly enlisted can be discharged, and as having forbidden other modes of obtaining their discharges: *Id.*

The Federal Government has, by those acts, assumed such jurisdiction, in cases of this kind, as to make it necessarily exclusive.—Per CLERKE, J.: *Id.*

EQUITY.

Adequate Remedy at Law.—The absence of a *plain* and *adequate* remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the proceedings: *Watson v. Sutherland*, 5 Wall.

Hence, where a creditor of A. levied on goods, a miscellaneous stock in retail trade, suitable for the then current season, and intended to be paid for out of the sales—in the possession of B., a young man recently established in trade and doing a profitable business, alleging that they had been conveyed to B. by A. to defeat his creditors—the court, upon being satisfied that they had not been so conveyed, held that the execution had been rightly enjoined; that as at law the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial—loss of trade, destruction of credit, and failure of business prospects—commercial ruin, in short—collateral or consequential damages, which might nevertheless ensue, would not be compensated for at law, but were properly prevented in equity: *Id.*

HIGHWAY.

Rights of Adjoining Owner to stop Drainage of Water off the Highway on his Land.—The owner of land which adjoins a highway may lawfully do any acts upon his own land to prevent surface water from coming thereon from the highway; and may stop up the mouth of a culvert built by the selectmen across the highway, for the purpose of conducting such surface water upon his land, providing he can do so without exceeding the limits of his own land: *Franklin v. Fisk*, 13 Allen.

What is a Defect.—An object in a highway, with which a traveller does not come in contact or collision, and which is not shown to be an actual incumbrance or obstruction in the way of travel, is not to be deemed a defect, for the sole reason that it is of a nature to cause a horse to take fright, in consequence of which he escapes from the control of his driver, and causes damage: *Kingsbury v. Dedham*, 13 Allen.

HUSBAND AND WIFE.

Evidence of Marriage.—Where there is no proof of actual marriage,—cohabitation and reputation are necessary to ground a presumption of marriage; proof of cohabitation alone is insufficient: *Commonwealth v. Stump*, 53 Penna.

Reputation consists of the speech of the people who have an opportunity to know the parties; to be proved by them and not by the wife: *Id.*

Marriage is in law a civil contract, not requiring any particular form of solemnization before officers of church or state, but must be evidenced by words in the present tense, uttered for the purpose of establishing the relation of husband and wife, and should be proved by the signature of the parties or by witnesses present when it was made: *Id.*

Therefore, where the evidence of the contract was the declaration

of the wife that, "about 31 years since she went to the house of A. S. to live with and keep house for him, under a mutual promise and agreement that they would sustain towards each other the relation of husband and wife, and that they did thus live and cohabit together," *it was held* that there was not proof of marriage in fact: *Id.*

An Act of Assembly legitimating children of a testator after a devise to them had vested, did not relieve the devise from collateral inheritance tax: *Id.*

The court below rejected evidence of declarations of the father, made out of the presence of his wife, that they were not married till after the children were born. *Held*, not to be error: *Id.*

INTERNATIONAL LAW.

Blockade—Contraband of War.—A blockade is not to be extended by construction: *The Peterhoff*, 5 Wall.

Semble, that a belligerent cannot blockade the mouth of a river, occupied on one bank by neutrals with complete rights of navigation: *Id.*

A vessel destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place, violates no blockade.

Hence trade, during 'our late rebellion, between London and Matamoras, two neutral places, the last an inland one of Mexico, and close to our Mexican boundary, even with intent to supply, from Matamoras, goods to Texas, then an enemy of the United States, was not unlawful on the ground of such violation: *Id.*

The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade: the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea: *Id.*

The classification of goods as contraband or not contraband, which is best supported by American and English decisions, divides all merchandise into three classes:—

I. Articles manufactured, and primarily or ordinarily used for military purposes in time of war.

II. Articles which may be and are used for purposes of war or peace according to circumstances.

III. Articles exclusively used for peaceful purposes.

Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege: *Id.*

Parts of a cargo described in a ship's invoices as cases of "artillery harness," as "men's army Bluchers," as "artillery boots," and as "government regulation gray blankets," come within the first class: *Id.*

Contraband articles contaminate the parts not contraband of a cargo if belonging to the same owner; and the non-contraband must share the fate of the contraband: *Id.*

In modern times conveyance of contraband attaches in ordinary cases

only to the freight of the contraband merchandise. It does not subject the vessel to forfeiture: *Id.*

But, in determining the question of costs and expenses, the fact of such conveyance may be properly taken into consideration with other circumstances, such as want of frankness in a neutral captain engaged in a commerce open to great suspicion and his destruction of some kind of papers in the moment of capture,—and this although it seemed almost certain that the ship was destined to a port really neutral, and with a cargo for the most part neutral in character and destination: *Id.*

The captain of a merchant steamer, when brought to by a vessel of war, is not privileged by the fact that he has a government mail on board from sending, if required, his papers on board the boarding vessel for examination; on the contrary, he is bound by that circumstance to the strictest performance of neutral duties and to special respect of belligerent rights: *Id.*

Citizens of the United States faithful to the Union, who resided in the rebel states at any time during the civil war, but who during it escaped from those states, and have subsequently resided in the loyal states, or in neutral countries, lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country: *Id.*

LACHES.

Activity in prosecuting Claim.—Where, in case of a collision, one of two parties injured institutes proceedings against the vessel in fault, and at his own expense, prosecutes his suit to condemnation of the vessel, or of the proceeds of her sale in the registry, another party injured by the same collision, who has contributed nothing to the litigation to establish the vessel's liability, but has stood by during that contest, and taken no part in it, cannot share in the proceeds of the sale of the vessel, until the claim of the first party is satisfied in full: *Woodworth v. Insurance Co.*, 5 Wall.

LANDLORD AND TENANT.

Land sold under Execution against the Landlord.—The lessee of land, sold under a judgment prior to his lease, does not become tenant at will of the purchaser, until after notice of the purchaser's election to determine the tenancy: *Adams v. McKesson's Executrix*, 53 Penna.

Such lessee is as completely the tenant of the purchaser under a verbal lease of less than three years as under a written lease, and under a demise of part of the land as of the whole: *Id.*

One hired to work land and receive as compensation part of the produce, is a cropper, not a tenant: *Id.*

LICENSE.

When irrevocable.—The rule that a license to do something on the licensor's land followed by expenditure on the faith of it is irrevocable, rests upon the principle of estoppel, because the parties cannot be placed *in statu quo*: *Huff v. McCauley*, 53 Penna.

Equity treats the license thus executed as a contract giving absolute rights: *Id.*

Where there has been only a consideration paid, there is nothing in the way of restoring the parties to their original condition: *Id.*

A license is not converted into a contract giving irrevocable interests in land, by the mere fact that a consideration was agreed to be paid for it: *Id.*

A contract that one may take coal for his works from the land of another, is a right of *profit à prendre*, is incorporeal, and incapable of creation except by grant or prescription: *Id.*

An easement cannot exist in parol: *Id.*

An interest in land or arising out of it, corporeal or incorporeal, must lie in grant: *Id.*

POWER.

When not revocable.—A power of attorney to collect moneys, &c., for the principal, the attorney to receive as compensation "one-half of the net proceeds," is not a power coupled with an interest, and is revocable: *Hartley and Minor's Appeal*, 53 Penna.

In the absence of an express stipulation to make a power of attorney irrevocable, there must co-exist with the power an interest in the thing to be disposed of or managed: *Id.*

STAMP.

Omission to Stamp Promissory Note.—An innocent omission to stamp a promissory note made after the passage of the U. S. St. of 1864, c. 173, though ante-dated to November 1862, will not render it inadmissible in evidence, if it is subsequently stamped in the presence of the court: *Tobey v. Chipman*, 13 Allen.

So an innocent omission to stamp an order for the payment of money, drawn after the passage of the U. S. St. of 1865, c. 78, will not render it invalid or inadmissible in evidence: *Id.*

Insolvent Bond—Omission of Stamp.—An insolvent's bond is a bond made necessary by legal proceedings, and does not require a stamp: *McGovern v. Hosback*, 53 Penna.

A voluntary bond unstamped is not void unless the stamp be omitted to evade the Act of Congress: *Id.*

LIST OF NEW LAW BOOKS RECEIVED BY THE PUBLISHERS OF THE AMERICAN LAW REGISTER.

METCALF.—Principles of the Law of Contracts, as applied by Courts of Law. By **THERON METCALF**. 8vo. pp. 357. New York: Hurd & Houghton. Philadelphia: Kay & Brother. \$4.50.

SCRIBNER.—A Treatise on the Law of Dower. By **CHARLES H. SCRIBNER**. 2 Vols. 8vo. Philadelphia: T. & J. W. Johnson & Co., 1867. \$15.

WISCONSIN.—Reports of Cases argued and determined in the Supreme Court of Wisconsin. By **O. M. CONOVER**, Official Reporter. Vol. XX., containing Cases decided at the June Term 1865, and January and June Terms 1866. Madison: Atwood & Rublee, 1867.

THE
AMERICAN LAW REGISTER.

DECEMBER, 1867.

WILLIAM WIRT.

THE lawyer who confines himself lifelong to the practice of his profession is not only circumscribed in action, but his reputation is ephemeral. Though he be known and honored in his life by the people of his county or district, whom he edifies and pleases in the court-room or on the rostrum, when he dies he is usually forgotten ere the lapse of a generation. Shakspeare says, "if a man would be remembered beyond the period that the bell tolls and the widow weeps, he must give his money to churches." If the observation be not an axiom, there is certainly philosophy in it.

The most distinguished and astute lawyers of the last age, or of the present, are hardly mentioned or heard of beyond the precincts of their immediate neighborhood. Those who have given the world a direction towards the good, by wise counsel, by patriotism and virtue, have had their names inscribed on the bright page of history and canonized in the hearts of the people. But, aside from the renown achieved by meritorious service and high-minded statesmanship, the case lawyer can never be known to posterity save by hearsay and impression.

Believing it pleasant and elevating, and that it tends to prompt to nobler action, to dwell on the character, the purity of motive, and devotion to truth of men who have ennobled their calling, who have struggled, perchance against untoward fortune, and at

last reached the goal for which they labored, let us with candor take a retrospective glance at the life of him who passed the shoals and reefs of a lawyer's career and achieved an eminence in jurisprudence both honorable and praiseworthy.

WILLIAM WIRT was once as familiarly known to the people of this country, and as highly revered as a jurist, as any member of the profession now living. Like thousands of men, he was from early life obliged to cut and carve out his own pathway. He was in every sense the architect of his own fortune. Although accidents occasionally conduce to a man's success, yet, chiefly, the mould of his fortune is in his own hands. "*Faber quisque fortuna sua*," saith the poet.

He realized the pain as well as the pleasure of adversity. Seneca was wont to say, after the manner of the Stoics, that, "the good things which belong to prosperity are to be wished; but the good things that belong to adversity are to be admired." The early trials through which he passed served only to strengthen, quicken, and make him the more able to grapple and cope with the intricate questions of jurisprudence and of state which were pressed upon him in after-life. Through tribulation he was made strong. The achieving and winning of renown with him did but reveal his virtues and worth without disadvantage.

His noble person, and nobler mind, seemed to fit him by nature for an advocate and jurist.

William Wirt was born at Bladensburg, in Maryland, on the 8th day of November 1772. He was of humble and respectable parentage. His father was a native of Switzerland; his mother, of Germany. His parents died before he had attained the age of nine years, when he was taken into the family of his uncle, Mr. Jacob Wirt, under whose guardianship he passed his boyhood.

He spent two years, without making much progress, in a school at Georgetown, now of the District of Columbia, when he was placed in a classical school in Charles county, Maryland. Being by nature a lively boy and given to saying witty things, "and singing songs of humor very well," he became a favorite with his mates.

Upon this period of his life he thus descants: "From the time I rose until I went to bed, the livelong day, it was all enjoyment, save only with two drawbacks, the going to school, and the getting

tasks on holidays; which last, by the by, is a practical cruelty that ought to be abolished." During his four years' tuition under the Rev. James Hunt, he became quite proficient in the classics and mathematics. The preceptor's library afforded him ample opportunity for general reading, of which he availed himself. His favorite authors at this time, whose works he read with avidity, were Josephus, Pope, Addison, Horner's Elements of Criticism, and Gay, the Earl of Warwick.

He delved in the rich field of *belles lettres*, which gave tone and vigor to his moral and intellectual nature. He once fancied, as did Blackstone in his youth, that he possessed something of the "divine afflatus," and devoted much time to poetry; though it is said his thought was sacrificed to rhythm, the realization of which fact doubtless discouraged his muse. He perhaps believed in the old partition of time which Lord Coke sanctioned "for the good spending of the day"—six hours of the twenty-four to the "sacred muse."

"Sex horas somno, totidem des legibus aquis
Quatuor orabis, des epulisque duos
Quod superest ultra sacris largire camœnis."

We would not regret that Wirt relinquished poetry, nor are we ready to exclaim, as Pope did of Lord Mansfield, "How sweet an Ovid was in Murray lost!"

At an early age he composed well in prose, and many of his schoolboy essays attracted the favorable attention of those who were judges of erudite composition.

Good Mr. Benjamin Edwards, father of the Hon. Ninian Edwards, who was a strong-minded and reflective man, took much interest in young Wirt after reading some of his productions, and rendered him assistance, not only pecuniarily, but afforded him every advantage to acquire a liberal education, and to follow the genius of his own mind.

He commenced studying law in 1790 in the office of the son of his former preceptor; but after one year's guidance there, removed to that of Mr. Thomas Swann, of Leesburg, in Virginia, where he made good progress, and, in the autumn of 1792, was admitted to the bar. At that time his stock of books was decidedly limited, his library consisting only of a copy of Black

stone, two volumes of "Don Quixote," and one volume of "Tristram Shandy."¹

He experienced, like thousands of young, aspiring lawyers in commencing, the perplexity and embarrassment, the doubts and forebodings which Sir William Blackstone depicted of himself. Nothing can be more hazardous or discouraging than the usual entrance upon the profession of the law.

"An inexperienced youth," he observes, "in the most dangerous season of life, is transplanted on a sudden into the midst of allurements or pleasure, without any restraint or check but what his own prudence can suggest, with no public direction in what course to pursue his inquiries, no private assistance to remove the distress and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and, by a tedious, lonely process, to extract the theory of law from a mass of undigested learning."

Mr. Wirt commenced his professional career at Culpepper Court House. He realized that the "law is a jealous mistress," and he devoted himself assiduously to her. At that time the profession seemed to him crowded, hardly a standing-place; but ere long he found, as Mr. Webster once told a student of his who had just been admitted to practice who complained there was "no room," that there was "room enough *up stairs*."

His first case is worthy of mention. It was a case of joint assault and battery, with joint judgments against three, of whom two had been released subsequently to the judgment, and the third, who had been taken in execution and imprisoned, claimed the benefit of that release as enuring to himself. Under these circumstances, the matter of discharge having happened since the judgment, the old remedy was by the writ of *audita querela*. Young Wirt, and his new-fledged associate, had learned from their Blackstone that the indulgence of courts in modern times, in granting summary relief in such cases by motion, had, in a great measure, superseded the use of the old writ; and, therefore, presented their case in the form of a motion. Mr. Wirt's friend, with all the alarm of a first essay, opened the case.

The bench was then in Virginia county courts composed of the ordinary justice of the peace; and the elder members of the bar,

¹ "Memoirs of Wirt," by John P. Kennedy.

by a usage the more necessary from the constitution of the tribunal, frequently interposed as *amici curiæ*, or informers of the conscience of the court. "It appears," says the record, "that upon the case being opened, some of these customary advisers denied that a release to one after judgment released the other, and they denied also the propriety of the form of proceeding. The ire of our beginner was kindled by this reception of his friend, and by this voluntary interference with their motion; and when he came to reply he forgot the natural alarms of the occasion, and maintained his point with recollection and firmness. This awakened the generosity of an older member of the bar, a person of consideration in the neighborhood, and a good lawyer. He stepped in as an auxiliary, remarking that he also was *amicus curiæ*, and perhaps as much entitled to act as others, in which capacity he would state his conviction of the propriety of the motion, and that the court was not at liberty to disregard it; adding, that its having come from a new quarter gave it but a stronger claim to the candor and urbanity of a Virginia bar.

The two friends carried their point in triumph, and the worthy ally said to his brethren, in his plain phrase, "that they had best make fair weather with one who promised to be a thorn in their side." From this time Mr. Wirt's practice began to increase. He extended his circuit into the neighboring county of Albemarle, where in two or three years after he married. The father of the fortunate young lady was a particular friend of Jefferson, Madison and Monroe, whose acquaintance Mr. Wirt afterwards made greatly to his advantage.

It may not be uninteresting or improper to notice in this connection a touching incident, which is told by a noted lecturer, of our hero, and the charming lady he married, to the effect that he was somewhat addicted to intemperance even after he was affianced. And that, on one occasion while intoxicated and lying in the gutter, the noonday sun blazing on him, the lady of his love chanced to pass that way, and seeing his condition, with deep emotion and commiseration, took her beautifully embroidered handkerchief and laid it over his face. We may premise, that she was as devoted as Mr. Moore's lovers, for she clung to him still, and practically exemplified, that love is not love—

"If 'tis not the same

Through grief and through danger, through sin and through shame."

He remained in that position for some time. Upon rising he took the handkerchief which had shielded his face, and, without particularly noticing, placed it in his pocket. Being wayworn and exhausted from drunkenness he walked to a grocery, and called for some brandy. As he was about to place the glass to his lips he took the handkerchief, belonging to his betrothed, to wipe his parched and perspiring brow, when, to his utter amazement, he discovered the name on it of her whom he adored, and was so overwhelmed with a sense of shame that he threw aside the glass which awaited him, and then and there resolved never to touch another drop of the enemy which steals away the brain. Whether the incident be true or not, that he kept the pledge we have no reason to doubt.

In 1799, Mr. Wirt removed to Richmond, where he was elected clerk of the House of Delegates, which office he held for two years, during which time he appeared occasionally as an advocate. Three years later the legislature appointed him chancellor of the eastern district of the state, upon which he took up his residence in Williamsburg; but finding the salary inadequate for the support of his family he soon resigned the office, and returned to the bar in Norfolk. As early as in 1802, Mr. Wirt was a brilliant and successful lawyer, and, as he somewhere says, his income was then £1200 a year. Upon visiting New York and Boston about that time, he was surprised at the smallness of lawyers' fees, and said a Virginia lawyer would starve on them.

After practising in Norfolk with success for three years he removed to Richmond, and, in 1807, achieved great distinction in the trial of Aaron Burr.

In that case Mr. Wirt displayed the qualities of an able lawyer and eloquent advocate. There are passages in his speech on the occasion which will compare favorably with any in Burke's speech in the trial of Warren Hastings. The gems of rhetoric scattered through it have often been selected for school declamation. The part commencing "Who is Blennerhassett?" is not only historical, but full of imagery and poetic diction. In portraying the character of Blennerhassett, and the injuries he sustained at the hands of Burr, he breathes the fire of his own impassioned heart. His eloquent and powerful argument elicited the favorable comment and admiration of the court, as well as the public at large.

He has justly been considered the hero of that occasion. He

might well be estimated thus, for the toil of his life had been to achieve those solid attainments which alone make brilliancy of utterance enduring in a court of justice.

There can be little doubt from the tone of Mr. Wirt's argument that he believed Burr guilty of treason.

The defence, led by the eccentric and powerful Luther Martin, endeavored to show that Burr was merely accessory. "Upon the whole," said Wirt with much emphasis, "reason declares Aaron Burr the principal in this crime, and confirms herein the sentence of the law; and the gentleman, in saying that his offence is of a derivative and accessorial nature, begs the question, and draws his conclusions from what, instead of being conceded, is denied." That Aaron Burr did not "derive his guilt from the men on the island, but imparted his own guilt to them:" that "he is not an accessory but a principal."

Luther Martin, it will be remembered, who was opposed to Mr. Wirt, took such a zealous interest in the trial that he was suspected by some of being a party to the crime of Burr. Mr. Jefferson, who, it is evident, became disgusted with the character of the defence, wrote Mr. Hay, the district attorney, to inquire whether it would not be advisable "to commit Luther Martin as *particeps criminis* with Burr?"

Mr. Wirt was then but thirty-five years of age, yet he exhibited a Websterian power of logic and legal acumen which never fails to charm and convince.

His argument in the *Cherokee Case*, on a motion for an injunction to prevent the execution of certain acts of the legislature of Georgia in the territory of the Cherokee Nation of Indians, in behalf of the Cherokees, is also an argument of great power and analysis.

Aside from his forensic efforts, one of the most finished productions of Mr. Wirt is his eulogy on Thomas Jefferson and John Adams, delivered in the Hall of Representatives, at the request of the citizens of Washington, on the 19th of October 1826. In this he reviews with peculiar accuracy and clearness the public services and characteristics of those revolutionary patriots, and illustrates his theme with a fund of classical allusion which enchants the reader, and could not have failed to command the admiration of those who heard it.

After delineating the greatness of Jefferson and Adams by

nature—the one, to borrow the language of Isaiah, called from the North, and the rising of the sun ; the other, from the South, where he shows his glory in the meridian—he says, education was not with them, as with minor characters, an attempt to plant new talents and new qualities in a strange and reluctant soil ; but “ It was the development merely of those which already existed. Thus, the pure and disinterested patriotism of Aristides, the firmness of Cato, and the devotion of Curtius, only awakened the principles that were sleeping in their young hearts, and touched the responding chords with which heaven had attuned them. The statesmanlike vigor of Pericles, and the spirit-stirring energy of Demosthenes, only roused their own lion powers, and informed them of their strength. Aristotle, and Bacon, and Sidney, and Locke could do little more than to disclose to them their native capacity for the profound investigation and ascertainment of truth ; and Newton taught their power to range among the stars. In short, every model to which they looked, and every great master to whom they appealed, only moved into life the scarcely dormant energies with which heaven had endowed them ; *and they came forth from the discipline, not decorated for pomp, but armed for battle.*”

No one was better able to portray the life and public services of Jefferson than Mr. Wirt ; for he had known him intimately for twenty-five years, and had studied his nature in every aspect. And the character and labors and moral worth of Mr. Adams he knew by heart. No one could have performed the duty of the occasion with more perfectness and ability ; and he did it nobly, grandly.

From the facile pen of Mr. Wirt, we have also the *Life of Patrick Henry*, a work which has justly been considered as finished a piece of biographical writing as ever appeared in this country. The work is not only true and complete of the subject, but it is written in a clear and racy style, full of incident and illustration, which irresistibly carries the reader from chapter to chapter, as though it were a touching and charming novel. Mr. Jefferson said of it : “ Those who take up the book will find they cannot lay it down ; and this will be its best criticism.” Mr. Gallatin, it is said, in the later years of his life, often recurred to the pleasure he experienced in the perusal of it, declaring it was

"the most masterly handling of the pen of biography" he ever knew.

Mr. Wirt's writings have the vigor and richness of Macaulay, with the simplicity and correctness of Franklin. He was not wholly unknown to the literary world at the time his life of *Henry* appeared, for in 1802, he wrote the celebrated letters under the title of *The British Spy*, which passed through several editions; and is too well known to require an extended notice at our hand.

In 1808, he wrote a series of essays over the signature *One of the People*, in which he advocated with much earnestness the pretensions of Mr. Madison to the presidency. His articles entitled *The Old Bachelor*, which appeared in 1812, displayed great versatility, and were widely read and admired.

Mr. Monroe appointed him Attorney-General of the United States in 1817, which office he accepted, when he took up his residence in Washington, where he continued in the efficient discharge of his duties through the administrations of Mr. Monroe and Mr. Adams.

The official opinions of Mr. Wirt have been collected in three large volumes, which are worthy of consideration and study. At the bar of the Supreme Court, observes his biographer, "he found the highest forensic theatre in the country; and perhaps there never was one in any country that presented a more splendid array of learning and talent conjoined." In the causes which it is the official duty of the attorney-general to prosecute or defend, the most conspicuous counsel of that bar are commonly combined against him.

In how many conflicts he sustained these odds against him, with a vigor always adequate to the occasion, is very well known to those who are familiar with our judicial history. After his term of office had expired, he continued to practise in the Supreme Court at Washington with signal ability. In the trial of Judge Peck, who was impeached by the House of Representatives, Mr. Wirt exhibited a marvellous power of analysis and legal knowledge, as a review of the proceedings will convince the reader.

In remembrance of the noble qualities and characteristics exhibited by Mr. Wirt, in his private and public life, we can cheerfully render to him the same encomium which he pronounced upon Patrick Henry. He had that foundation of strong natural

sense, without which genius is a misfortune ; an instinctive accuracy of judgment, which always proportioned his efforts to the occasion. He was never guilty of the ridiculous and common error amongst young members, of attempting to force the subject beyond its nature—of swelling trifles with consequence, and working the ocean into tempest, “To waft a feather, or to drown a fly.” He was always earnest and dignified—never captious. Mr. Wirt, we believe, possessed in a large degree the stern virtues, the moral worth, and the earnest, firm, and profound mind of Marshall.

In the several judicial and state offices to which Mr. Wirt was called, he fulfilled his duties with faithfulness and credit. He died in Washington, February 18th 1834.

It were well if the young and rising members of the American bar would study more earnestly and thoroughly the character and genius of such men ; and we can but indulge the hope that the country and the profession may be abundantly favored in all coming time with lawyers of the stamp of WILLIAM WIRT.

J. F. B.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

JOHN G. HANSBROUGH ET AL. v. PHILIP F. W. PECK.

Where a vendor of real estate on default in the terms of payment by vendee, goes into a court of equity and has the contract declared void and of no effect, and is remitted to his original title and possession, this is not a proceeding in rescission, but in affirmance of the contract, and does not entitle the vendee to recover back the part of the purchase-money already paid.

A purchaser of real estate, who has paid part of his purchase-money or done an act in part performance of his agreement and then refuses to complete his contract, the vendor being willing to do his part, will not be permitted to recover back what has been thus advanced or done.

Where a parol promise is substantially the same as a previous written one, and nothing is done under the latter which the promissor was not already bound to do under the former, no new consideration passing between the parties, the existence or enforcement of the parol contract cannot be set up as a rescission of the former written one.

A purchaser after payment of part of the purchase-money, intended to abandon the contract, and the vendor promised, if he would pay up arrears, to indulge him

for a certain time. The purchaser paid up the arrears, but the vendor enforced his contract within the time (as alleged) that he promised to forbear. *Held*, that there was no consideration for the promise, the purchaser having done nothing he was not already bound to do by his original contract.

THIS was an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois.

The bill was filed in the court below by the plaintiffs to recover back moneys paid upon a contract, dated 28th January 1857, for the purchase by them of several lots of land in the city of Chicago; and, also, for the value of improvements made on the same, on the ground that the contract had been rescinded by the defendant.

The purchase-money amounted to \$93,000, to be paid on the 29th April 1861, some four years and three months from date, together with semi-annual interest at the rate of 10 per cent. per annum. After erecting improvements on the premises of the value of \$18,000, and paying the interest for two years, the plaintiffs becoming embarrassed, or dissatisfied with their contract, were desirous of surrendering it, but were persuaded by the defendant to remain, and paid the interest for another year, 1859. After that no further payments were made, and, on the 1st April 1861, the defendant filed a bill in chancery in the state court to prevent the removal of the buildings from the premises, and to get possession of the same, and, on the 23d August 1862, a decree was entered to this effect, and the defendant put into the possession.

The opinion of the court was delivered by

NELSON, J.—It will be seen from the statement of facts, that the plaintiffs were in default on account of the non-payment of the interest for more than a year, and also that the principal fell due a few days after the filing of the bill on account of this default in the payments. The contract was a very stringent one. Time was, in terms, made of the essence of it, in respect to the payments; and, further, in case of a default in any one payment, for thirty days, the agreement was to be null and void, and no longer binding, at the option of the vendor, and all payments that had been made were to be forfeited to him; and also in case of default in any of the payments it was agreed that the contract, at the election of the vendor, was to be at an end, and the purchasers deemed

to be in possession as tenants at will, liable for a rent equal to the amount of interest of the purchase-money.

The decree founded on this contract in the suit in chancery, and which is made a part of the bill in the case before us, and which suit was litigated between these parties, restrained the defendants, the purchasers, from removing the buildings from the premises, and declared them to be fixtures; and for the default in the payment of the purchase-money the plaintiff, the vendor, was put in possession, and all the tenants were required to attorn to him; and, further, it declared that he was entitled to the estate and interest in the lots, the same as before the contract, and to remove any doubt in the title by reason of the contract and the default in the payments, it declared that the premises shall be discharged from any encumbrance or charge in respect to the contract of sale; and that the purchasers, or any one claiming through them, be for ever debarred from having any estate, or interest, or right of possession in the premises, having lost the same by wilful default; and the articles of agreement are to be held in relation to the title and possession as of no effect and void, as it respects the vendor and all claiming under or through him.

Now, this is the decree that is relied on as having rescinded the contract at the instance of the defendant, by reason of which the plaintiffs have become entitled to recover back the purchase-money paid, together with the value of the improvements. The position is, that there is no longer a subsisting contract, as an end has been put to it by the vendor, and he has in consequence resumed the possession, and claims to hold the estate the same as if no contract had ever existed, and that in such case the purchaser, upon settled principles of law and equity, is at liberty to recover back the consideration paid and the value of the improvements. But the difficulty is, that the vendor has only availed himself of a provision of the contract, which entitled him to proceed in a court of chancery, by reason of the default of the purchaser in making his payments, to put an end to it and be restored to the possession. It is a proceeding in affirmance, not in rescission of it, by enforcing a remedy expressly reserved in it. Indeed, without such clause or reservation, the remedy would have been equally available to him. It is a right growing out of the default of the purchaser, as the law will not permit him both to withhold

the purchase-money and keep possession and enjoy the rents and profits of the estate ; nor will it subject the vendor to the return of the purchase-money if he is obliged to go into a court of equity to be restored to the possession.

In case of a default in the payments, there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase-money, and take out execution against the property of the defendant, and among other property, the lands sold ; or he may bring ejectment, and recover back the possession, but in that case, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase-money, together with costs, is entitled to a performance of the contract ; or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due, or be for ever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase-money, and in case of a persistent default, his better remedy, and under some circumstances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The court will usually give the purchaser a day, if he desires it, longer or shorter, depending on the particular circumstances of the case, to raise the money and to perform his part of the agreement.

This mode of selling real estate in the United States is a very common and favorite one, and the principles governing the contract, both in law and equity, are more fully and perfectly settled than in England or any other country. The books of reports are full of cases arising out of it, and every phase of the litigation repeatedly considered and adjudged. And no rule in respect to the contract is better settled than this : That the party who has advanced money or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done : *Green v. Green*, 9 Cowen 46 ; 13 J. R. 364, SPENCER, J. ; 6 Gray 412 ; 42 Barbour 58.

The same doctrine has been repeatedly applied by the courts of Illinois, the state in which this case arose: 21 Ill. R. 236, and other cases referred to in the argument.

This principle would of itself have defeated the plaintiffs in this suit, independently of the decree foreclosing their equity in the contract.

It appears in the case that the parties agreed upon the rate of 10 per cent. interest for the forbearance of the purchase-money unpaid, when at the time, as is admitted, the legal rate was only 6 per cent. But this law did not invalidate the contract. It authorized the party to recover of the party taking usury three-fold the amount above the legal rate, at any time within two years after the right of action accrued. This bill was filed the 23d August 1862. The last payment of interest was made 31st January 1860. More than two years, therefore, had elapsed before the suit was brought.

We should add, it is not admitted by the defendant that this arrangement had the effect to make the contract usurious; and would not, according to the case of *Bute v. Bigood*, 7 B. & Cr. 453, if the excess of interest stipulated for was in fact a part of the purchase-money.

After the default of the purchasers, and when they were disposed to surrender the contract, the vendor proposed to them if they would abandon the idea, and pay up the taxes in arrears and interest that had accrued, he would indulge them, and to that end, and until a revival of business in Chicago, he would be satisfied with the net income from the property over and above the taxes and insurance, and it is averred that they agreed to the propositions and paid the taxes and interest, but that the vendor declined to carry out the agreement and enforced the contract, though there had not been any considerable increase of income from the property or revival of trade and business in Chicago. This provisional arrangement is very loosely stated in the bill, but is, of course, admitted by the demurrer. It admits the revival of business to some extent before the enforcement of the contract. There is great difficulty, however, in determining the extent of increase contemplated by the arrangement from the statement in the bill. It was entered into in November 1859, and this suit was not instituted till August 1862, some two years and nine months afterwards.

But the true answer to this part of the case is, that the arrangement was not in writing, nor any consideration passing between the parties that could give validity to it. The promise by the purchasers was but in affirmation of what they were bound to perform by their written agreement, and all that was done was but in fulfilment of it.

We have thus gone carefully over the case as presented, and considered every ground set up on the part of the plaintiffs for the relief prayed for; but, with every disposition to temper the sternness of the law as applicable to them, we are compelled to say that, according to the settled principles both of law and equity, a case for relief has not been established.

The truth of the case is, that these plaintiffs improvidently entered into a purchase beyond their means, and, doubtless, relied very much upon the rise in the value of the estate and of the income, to meet the payments and expenditures laid out upon it. Their anticipations failed them, and a heavy debt was the consequence, beyond their ability to meet. Of the \$93,000 purchase-money, they have paid only \$10,000. Of interest, some \$28,000. They expended for improvements \$18,000. There still remained due against them \$83,000 purchase-money and over \$20,000 interest, at the time the vendor went into possession. The plaintiffs themselves had been in the possession and enjoyment of the premises for a period exceeding that for which the interest on the purchase money had been paid, which, at least, must be regarded as an equivalent for the money thus paid.

Decree of the court below affirmed.

In *Ketchum v. Evertson*, 13 Johns. 359, after stating, in language adopted by the court in the principal case, the general principle, that a vendee having paid part of the purchase-money and then refusing to complete his bargain shall not be allowed to recover back what he has paid, SPENCER, J., continues: "It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and because they chose to do so make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has

advanced money upon it, would have the same right to recover it back that the plaintiffs have."

This rule appears to have been uniformly administered in New York: *Dowdle v. Camp*, 12 Johns. 451; *Ellis v. Hoskins*, 14 Id. 363; *Green v. Green*, 9 Cowen 46; *Haynes v. Hart*, 42 Barb. 58. In *Utter v. Stuart*, 30 Barb. 20, however, where a vendor, under a right reserved in the contract, declared it void, and took possession of the land, it was held that the vendee might recover the money paid, although the circumstances were such that, had the vendor chosen,

he could have enforced a forfeiture for failure of vendee to comply with the contract. The court does not deny the principle above stated; but, on the contrary, expressly affirms it, and the decision is placed on the ground that the vendor had several remedies, and that, having elected one of them, he must be held strictly to the rules governing that one. "Had the defendant (the vendor) seen fit to exercise the right of forfeiture, or had he placed his defence on that ground, and relied upon the sale and conveyance as evidence of that fact, it is certain that the plaintiff could not have maintained this action. But the defendant, both in his answer and in his proof, places himself upon the right reserved in the contract; and that was a right to declare the contract void in a certain contingency, which contingency having happened, the defendant availed himself of it."

The general rule governing the rescission of contracts, that the party rescinding must put the other in *statu quo*, was held therefore to apply. It is difficult, however, to reconcile this case with *Haynes v. Hart*, 42 Barb. 58, or indeed with the previous cases cited. In the latter case, it is said by JOHNSON, J., that "the party fails to get the property bargained for, because he neglected and refused to pay the purchase-price, and the owner takes it as he would have had the right to do without any such provision in the agreement. But the plaintiff expressly agreed he might take it in case of a default, and there the contract ends. *There is no promise for paying back, and there can be no recovery without, in such a case.*"

It may, therefore, be doubted whether the law was correctly applied in the case of *Utter v. Stuart*.

In *Rounds v. Baxter*, 4 Greenl. 454, it was held by the Supreme Court of Maine that where the vendor resumed possession of the land, the vendee being in default, could not recover the payments already made. And in *Morton v. Chandler*, 6 Greenl. 142, A. being indebted to B., gave him a recognisance on which execution was issued, and A.'s land taken by extent to satisfy. A., in order to redeem the land, paid part of the debt, but failed to pay the whole, so that his right to redeem was lost. He afterwards brought an action in *assumpsit* to recover the money thus fruitlessly paid, and his counsel endeavored to distinguish the case from *Rounds v. Baxter*, on the ground that the rights of the parties here were determined by statute, and not by their own contract; but the court held that it was a voluntary payment, and could not be recovered. So also *Smith v. Haynes*, 9 Greenl. 128.

Similar decisions have also been made in other states: *Seymour v. Bennett*, 14 Mass. 266; *Cartwright v. Gardner*, 5 Cush. 273; *Leonard v. Morgan*, 6 Gray 412; *Page v. Cole*, 6 Clarke 153; *Walters v. Miller*, 10 Iowa 427; *Donaldson v. Waters*, 30 Ala. 175.

In Indiana, however, a different rule would seem to prevail. In *Gilbreth v. Grewell*, 13 Ind. 484, a contract of sale of land provided that if default were made by the purchaser in fulfilling any part of the contract, the seller might regard the contract as forfeited, and resell the land.

The court held that if the seller enforced the forfeiture he must account to the purchaser for payments made, with a right, however, to deduct damages accruing to him from the purchaser's breach of the agreement.

J. T. M.

Supreme Judicial Court of Maine.

WILLIAM BARNES v. MARY HATHORN.

A tomb erected upon one's own land, is not necessarily a nuisance to his neighbor; but it may become such from locality and other extraneous facts.

Plaintiff proved that defendant's tomb, erected within forty-four feet of the former's dwelling-house, contained, in 1856, nine dead bodies, from which was emitted such an effluvium as to render his house unwholesome; that, after an examination by physicians, the bodies were removed; that the tomb remained unoccupied thereafterwards, until 1865, when another body was therein interred; that the plaintiff's life was made uncomfortable while occupying his dwelling-house, by the apprehension of danger arising from the use of said tomb; and, that the erection and occupation of said tomb had materially lessened the market value of his premises. In an action for damages on the foregoing facts: *Held*, a nonsuit was improperly ordered.

ON EXCEPTIONS from *Nisi Prius*.

Tallman & Larrabee, for the defendant.

Gilbert, for the plaintiff.

KENT, J.—The facts, which the plaintiff proved or offered to prove, on which the presiding judge ordered a nonsuit, are substantially as follows:—That the husband of the defendant, Mary Hathorn, in 1846, built a tomb on the premises now owned by her, and within forty-four feet from the west side of the plaintiff's house, and the windows of his parlor, sitting-room, and dining-room, all of which rooms were on that side of his house; that dead bodies were from time to time deposited in said tomb, until about the year 1856, when nine such bodies were in the tomb; that such an effluvium was emitted from them that the plaintiff's house became unwholesome, and, after an examination of the premises by physicians, the defendant caused them to be removed from the tomb; that the tomb remained unoccupied for six years, and until October 1865, when the defendant caused the tomb to be opened and another dead body to be deposited for burial therein; that there was a wooden-frame building over the tomb, which was whitewashed; that the tomb was of brick, with ventilators at each end; that the plaintiff had resided for twenty-five years, and still resides, in a house owned by himself and on his lot of about three acres; that the defendant's land adjoins his, and the dividing line is fourteen feet from his dwelling-house, and her lot

contains about 130 acres; that the erection and occupation of the tomb, as alleged in the writ, diminished the market value of the plaintiff's house and lot from \$1000 to \$1500; and that his life in the occupancy of his premises is made uncomfortable by the apprehension of danger arising from the use of said tomb as a burial-place.

The plaintiff introduced two physicians, who testified that the effect of burying dead bodies in the tomb might be unwholesome and injurious to the occupants of the house; if there were much miasma, long continued and concentrated, it might be fatal; and that any emission from such bodies might be injurious to the physical and mental system; and, without any effluvia, it might injuriously affect the inmates of the house by exciting the imagination.

The action is for injury to the plaintiff by reason of a nuisance continued by the defendant.

The question before us is whether, upon the case as above stated, a nonsuit was properly ordered.

What is a nuisance? In considering this question, when the complaint is based upon the use by another of his own property, we are first met by the general doctrine of the right of every man to regulate, improve, and control his own property; to make such erections as his own judgment, taste, or interest may suggest; to be master of his own, without dictation or interference by his neighbors. On the other hand, we meet that equally well-established and exceedingly comprehensive rule of the common law, "*sic utere tuo, ut alienum non lædas*," which is the legal application of the gospel rule of doing unto others as we would that they should do unto us.

The difficulty is in drawing the line in particular cases, so as to recognise and enforce both rules, within reasonable limitations. It is quite clear that the law does not recognise a legal right in any one to compel his neighbor to follow his tastes, wishes, or preferences, or to consult his mere convenience. He cannot dictate the style of architecture, or, generally, the location of the buildings; or maintain that an unsightly or ill-proportioned edifice is a nuisance, because it offends his eye or his cultivated taste. Nor can he interfere because he has idle and unfounded fears of ill effects from the use of the adjoining lot. There may be many acts which to the eyes of others appear to be unneighborly and

even unkind, and entirely unnecessary to the full enjoyment of the property—vexatious and irritating, and the source of constant mental annoyance, and yet they may be but the legal exercise of the right of dominion, and therefore cannot be deemed nuisances. The diminution of the market value of adjacent buildings, by such use, will not of itself make it a nuisance. But there is a limit to such right. No man is at liberty to use his own without any reference to the health, comfort, or reasonable enjoyment of like public or private rights by others. Every man gives up something of this absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered unreasonably in the use and enjoyment of their property. This is the fundamental principle of all regulated civil communities, and without it society could hardly exist, except by the law of the strongest. This illegal, unreasonable, and unjustifiable use to the injury of another, or of the public, the law denominates a nuisance. Such use may be a public nuisance, and it is so when it affects the community generally. When it affects an individual it is called a private nuisance. If, however, an individual sustains special damage to himself, beyond that common to the public, by reason of a public nuisance, he may maintain an action for such special injury.

“Nuisance signifies anything that worketh hurt, inconvenience, or damage:” 3 Black. Com. 215. “Private nuisances may be defined anything done to the hurt or annoyance of lands, tenements, or hereditaments of another:” *Id.*

“Nuisances to a dwelling-house, are all acts done by another from without, which render the enjoyment of life within the house uncomfortable, whether it be by infecting the air with noisome smells, or with gases injurious to health, or by exciting the constant apprehension of dangers:” Greenl. on Ev. vol. 2, 467.

The general rule of law has been applied to many cases varying in their character and circumstances. We are at present chiefly interested in those relating to dwelling-houses, the habitations of men, although it is useful to examine the whole range of authorities, to extract, if possible, the true principles applicable to the subject.

There is one class of cases, arising from the exercise of trades or business, which are in their nature offensive, or which render the occupation of buildings near them unhealthy, or decidedly

uncomfortable. Many of these cases may be found collected in a very recent case in this state: *Norcross v. Thoms*, 51 Maine 503, and more fully in the case of *Brown v. Perkins*, 12 Gray 97. It is unnecessary for us to repeat them here. From the general tenor of the reported cases, we find that certain doctrines are recognised and acted upon. One is, that some trades, occupations, or acts are regarded as in themselves and inherently noxious, or offensive and prejudicial, without extraneous proof. In other cases they are not necessarily nuisances, but may become so from location or some extraneous fact. Another well-established doctrine is, that it is not necessary to prove that the air is poisoned or rendered positively unhealthy; it is enough if the matter alleged to be a nuisance is offensive to the senses, or in any way renders the enjoyment of life and property uncomfortable: *State v. Haines*, 30 Maine 65; *Rex v. White*, 1 Burr. 337; *Fish v. Dodge*, 4 Denio 311; *State v. Pierse*, 4 McCord 472; *Cutlin v. Valentine*, 9 Paige 575; *Rex v. Neil*, 2 Car. & Payne 485.

Exciting constant, and reasonable apprehension of danger, although no actual injury has been occasioned, has been held to be a nuisance. Thus, the keeping of large quantities of gunpowder near inhabited dwellings, or suffering an adjoining tenement to become ruinous and in danger of falling: Greenl. on Ev., vol. 2, 467, and cases before cited.

The definitions and rules applicable to cases as they arise, must be general, and each case must be brought to the test of the principles laid down. Usually, therefore, it becomes a mixed question of law and fact, whether, on the case proved, the existence of a nuisance is established or not. If, however, it is clear upon the facts, that a jury would not be authorized to find that a nuisance did exist, the judge would be justified in ordering a nonsuit.

The case finds that the erection and continuance of a private tomb is the nuisance complained of. A man may have a legal right to build such a tomb on his own land, as a general proposition. It is not in itself and inherently a nuisance to his neighbors. If a nuisance at all, it becomes so from its locality or other extraneous facts. However unwise or inexpedient it may be, in the judgment of reflecting men, to deposit the remains of deceased relations or friends in private burying-places on private lands, considering the constant change in the title of real estate

in our country, and the almost certainty that in one or two generations no one will be left to care for or protect the graves, yet we know of no law which prohibits such erections or interments. But such tombs may be or may become nuisances. On the facts stated, this particular tomb was, at one time, beyond dispute, a very serious nuisance, when it "was occupied by nine dead bodies which emitted such an effluvium as to render the plaintiff's house unwholesome;" and when, after an examination of the premises by several physicians, all the bodies were removed, it could hardly be questioned that it was then a nuisance. But the defendant says that, after these bodies were removed, it ceased to be of such a character. Whilst the tomb remained for six years unoccupied, the only ground on which it could be then called a nuisance, probably, was its unpleasant proximity to the house of the plaintiff. It was only some fifteen paces from the windows of his dining and sitting-room. It was certainly not a very cheering or exhilarating prospect which met the plaintiff's vision whenever he looked abroad. How far, to a man of ordinarily nervous temperament, or to one of a sensitive nature, who shrunk from the constant view of this fixed memorial of death and decay, this erection might prove injurious to health, it is impossible to say.

But, that it must have affected his comfort and happiness in the occupation of his dwelling may be less questionable. There seems to have been no necessity for this close proximity, as the defendant's farm consisted of at least 130 acres. On what ground this spot, almost under the droppings from the plaintiff's house, was chosen, instead of some retired place, on this large farm, does not appear, and is not, perhaps, material in our examination of the case.

But, it seems, that after six years from the time of removal, the defendant again opens the tomb, and commences the deposit of deceased friends anew. One such body had been thus placed in the tomb before this action was brought. This act would seem to indicate an intention to again use it for the place of interment of her family. Now, considering the result stated as having been produced by the former occupation, might not a man of ordinary firmness and judgment be reasonably apprehensive of danger?

In addition to this, we have the testimony of the physicians called on the trial, that *any* emission from dead bodies in that tomb might be injurious to health, bodily and mentally. It had

proved so before, and might again. A single body might not be so liable to create deadly or noxious effluvia as a larger number. But it would be of the same general character, and might of itself prove uncomfortable, if not positively unhealthy. The defendant made no disavowal of an intention to place other bodies there.

On the whole, we are of opinion, that the case should have been submitted to the jury on the evidence, with proper instructions, and that the nonsuit was not properly ordered.

Exceptions sustained.

Nonsuit set aside, and new trial granted.

CUTTING, WALTON, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

The general result of all the cases on this subject seems to be that, in an action for nuisance to property, it is sufficient to show that the premises affected cannot be enjoyed as fully and amply as before, or are rendered unfit for habitation by increased danger (*Ryan v. Copes*, 11 Rich. Law 217), or that their value is substantially impaired by the nuisance (but see *White v. Cohen*, 1 Drew 312); for whatever is injurious to the health (*Story v. Hammond*, 4 Ham. 376; *Douglass v. State*, 4 Wis. 387) or indecent (*Reg. v. Gray*, 4 Fost. & Fin. 73), or offensive to the senses (*State v. Wetherall*, 5 Harring. 477), or an obstruction to the use of premises, so as essentially to interfere with the enjoyment of life or property, is a nuisance. Thus, a regatta, causing many people to assemble, whereby an adjoining park was injured and rights of fishing interrupted, was held a nuisance: *Bostock v. Railway*, 5 De G. & S. 584. So, the stopping of a rivulet running to the land of another, and so diminishing the water used by him for his cattle (*Raikes v. Townsend*, 2 Smith 9); the keeping of gunpowder improvidently or where it may be dangerous to human life (*People v. Sands*, 1 Johns. 78; *Cheat-*

ham v. Shearon, 1 Swan 213); even a dwelling-house, if kept in a filthy state, or so as to create danger of contagion (*State v. Pierse*, 4 McCord 472; *Meeker v. Van Rensselaer*, 15 Wend. 397); a bowling-alley, gaming-house, or public liquor-store (*State v. Doon*, R. M. Charl. 1; *Tanner v. Albion*, 5 Hill 121; *State v. Bertheol*, 6 Blackf. 474; *State v. Haines*, 30 Me. 65); the corruption of water by the discharge into it of sewage, or even by the use of it for mechanical or manufacturing purposes (*Goldsmid v. Tunbridge Wells*, Law Rep. 1 Ch. 349; *Smith v. McConathy*, 11 Miss. 517; *Lewis v. Stein*, 16 Ala. 214; *Howell v. McCoy*, 3 Rawle 256). Some occupations may be nuisances in a populous neighborhood, though innocent in a proper situation, as slaughter-houses (*Brady v. Weeks*, 3 Barb. 157; *Peck v. Elder*, 3 Sandf. Sup. Ct. 126); soap or fat-boiling factories (*Honard v. Lee*, 3 Id. 281; *Cropley v. Murphy*, 1 Hilton 126); manufactures attended with great noise (*Crum v. Lambert*, Law Rep. 3 Eq. 409; *Scott v. Firth*, 10 L. T. N. S. 240; *Fish v. Dodge*, 4 Denio 311); the use of a dock for the landing of emigrant passengers (*Brower v. New*

York, 3 Barb. 254). And in such a case it is no defence that the business was begun when there were no inhabitants in the vicinity, more than twenty years before: *Commonwealth v. Upton*, 6 Gray 473; *Douglass v. State*, 4 Wis. 387; *Brady v. Weeks*, 3 Barb. 157. The running of railroad cars past a church on Sunday may be a nuisance (*First Baptist Church v. S. & T. Railway*, 5 Barb. 79), but it is the worshippers, not the proprietors, who are damaged (*Same v. Utica & S. Railway*, 6 Id. 313); and in *Williams v. N. Y. Central Railway*, 18 Id. 222, the court held that it must be a peculiar case where real estate was injured by the usual concomitants of the passage of a railroad train. See *Bell v. O. & P. Railway*, 25 Penna. St. 161; *Geiger v. Filor*, 8 Fla. 325; 2 Redfield on Railways (3d ed.), § 226. Other pursuits may be nuisances or not, according to the manner in which they are conducted and the surrounding circumstances, e. g., a boarding or livery stable (*Dargan v. Waddil*, 9 Ired. 244; *Kirkman v. Handy*, 11 Humph. 406; *Coker v. Bilge*, 10 Ga. 336), a steam-engine (*Davidson v. Isham*, 1 Stockt. 186), and gasworks (*Carhart v. Gas Co.*, 22 Barb. 297; *Reg. v. Gas Co.*, 18 Jur. 146; 8 Cox C. C. 317). Brickmaking has been held a nuisance to adjoining land (*Walter v. Selfe*, 4 De G. & S. 315), but only when done in an improper place, so as to take away the enjoyment of life or property (*Hole v. Barlow*, 4 C. B. N. S. 334; *Carey v. Ledbetter*, 3 Post. & Fin. 14); and in *Beardmore v. Treadwell*, 3 Giff. 683, it was held to constitute a nuisance where the defendant, having contracted to supply bricks for fortifications, had erected brick-kilns three hundred and forty yards from the plaintiff's mansion, and close to her boundary. Whether brickmaking is a nuisance depends on the circumstances: *Cleave v. Mahoney*, 9 W. R. 882. To

constitute a nuisance, there must be real and sensible damage, having regard to the situation and use of the property injured: *Scott v. Firth*, 4 Post. & Fin. 349; and this is a question for the jury: *Pinckney v. Ewens*, 4 L. T. N. S. 741. The principles governing these actions are well summed up in the Exchequer Chamber, in the case of *Tipping v. Smelting Co.*, 4 B. & S. 608 (s. c., House of Lords, 11 Jur. N. S. 785), that every man must so use his own property as not to injure that of his neighbor, unless by reason of the lapse of time he has acquired a prescriptive right to do so. But the law does not care for trifling inconveniences, and looks at everything from a reasonable point of view; and therefore, in an action for injury to property by noxious vapors arising from the land of another, the injury must be such as visibly to diminish its value, comfort, and enjoyment. In determining this question, the time, the locality, and all the circumstances, should be considered. And where great works are carried on, which are the means of developing the national wealth, persons must not stand on extreme rights and bring actions for every petty annoyance. And see *Bamford v. Turnley*, 3 B. & S. 66; *Stockport Waterworks v. Porter*, 7 Hurls. & N. 160.

The cases of excavations on one's own land, whereby the adjoining property of another is injured, though sometimes attempted to be supported by reasoning within the doctrine of the principal case, seem rather to be governed by the law of easements. See *Brown v. Windsor*, 1 C. & J. 20; *Bradbee v. Hospital*, 2 Dowl. N. S. 164; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Peyton v. London*, 9 B. & C. 725; *Partidge v. Scott*, 3 M. & W. 220; *Cooper v. Barber*, 3 Taunt. 99; *Hide v. Thornborough*, 2 Car. & K. 250. But it is sometimes hard to distinguish under which head a case is to be ranked:

Trower v. Chadwick, 3 Bing. N. C. 334; s. c., 3 Scott 699; 8 Id. 1; *Dodd v. Holme*, 1 Ad. & E. 393; *Humphreys v. Brogden*, 12 Q. B. 739; *Jeffries v. Williams*, 5 Exch. 792; *Taylor v. Stendall*, 7 Q. B. 634.

At common law, trespassers on land cannot complain of any erection by the owner thereof, whereby they have received injury. This principle was applied in England, before stat. 7 & 8 Geo. 4, c. 18, to the case of a trespasser in a wood in which he knew that there were spring-guns: *Ilott v. Wilkes*, 3 B. & Ald. 304. But the trespass must not have been induced by such owner: *Townsend v. Watken*, 9 East 277. See *Dean v. Clayton*, 7 Taunt. 489; *Bird v. Holbrook*, 4 Bing. 728; *Jordin v. Crump*, 8 Mees. & W. 782. And persons using for their own benefit land subject to a public easement are liable for all damage happening to others by reason of negligence in such use: *Proctor v. Harris*, 4 Car. & P. 337; *Daniels v. Potter*, Id. 262; *Drew v. N. R. Co.*,

6 Id. 754; *Beatty v. Gilmore*, 16 Penna. St. 463. And this principle applies to the occupant of a house with an area on a public street (*Coupland v. Hardingham*, 3 Camp. 398; *Barnes v. Ward*, 2 Car. & K. 661), and to persons working a quarry near the highway (*Reg. v. Mutters*, 11 L. T. N. S. 386); but it must be close to the highway (*Hounsell v. Smith*, 7 C. B. N. S. 731), and the plaintiff must have exercised due care (*Irwin v. Sprigg*, 6 Gill 200; *Baltimore v. Marriott*, 9 Md. 160; *Crommelin v. Coxe*, 30 Ala. 318). Perhaps we may include under the same principle the exposure of disgusting and obscene pictures on or near a public place (*Reg. v. Gray*, 4 Fost. & Fin. 73), or the doing of anything to gather a large crowd in, and thus obstruct, the highways of a city: *People v. Cunningham*, 1 Denio 524; *Baker v. Commonwealth*, 19 Penna. St. 412; *State v. Buckley*, 5 Harringt. 508.

H. N. S.

District Court of Hamilton County, Ohio.

STATE OF OHIO EX REL. EPHRAIM T. BROWN v. JOHN RITT AND ANTHONY SHONTEN.

Under the Ohio statute, passed May 3d 1852, "to regulate the election of state and county officers" (3 Curwen's Revised Statutes 1920), after the polls of an election have been once opened "between the hours of six and ten in the morning" in pursuance thereto, they cannot be "closed" for any purpose until six o'clock in the afternoon, without rendering the election illegal and void.

INFORMATION in the nature of a *quo warranto*.

This was a proceeding to contest the legal right of the defendant, John Ritt, to exercise the office of mayor of the village of Mount Airy in the county of Hamilton. It appeared that the relator and the said John Ritt were opposing candidates for said office at the election held on the first Monday of April 1867. Ritt received a majority of the votes cast, and the certificate of

the election was afterwards issued to him by the recorder of the village.

The relator filed an information in the nature of a *quo warranto*, claiming that the election was void by reason of certain irregularities and misconduct on the part of the judges in conducting it, and that, therefore, the old mayor, the defendant Shonter, continued in office. The matter relied on as vitiating the election was the fact that the officers of the election, after the polls had been regularly opened, between the hours of 6 and 10 o'clock, A. M., left the place of voting at about half past 11 o'clock, A. M., taking with them the ballot-box, and returned with it at about half past 1 o'clock, P. M., when the voting was resumed. The answer of the defendant, Ritt, on this point was as follows: "The polls of said election were opened between the hours of 6 and 10 o'clock in the morning and closed at 6 o'clock in the afternoon of the same day, that is, the first Monday of April aforesaid. This defendant admits that the judges and clerks of said election left the place of voting about the usual time for dinner in that neighborhood, and were absent therefrom about one hour, and that meanwhile they deposited the ballot-box in a place of security; but he avers that this was done with the consent and upon the advice of the relator, Ephraim T. Brown, who was then and there a candidate for the office of mayor as aforesaid, and with the consent likewise of all the voters then and there assembled. He denies that said ballot-box was then or at any time during the hours of the election as above stated, out of the custody or possession of the judges; or that by reason of the matters alleged in the information, or any of them, any qualified voter of the village of Mount Airy was prevented from voting or failed to vote on said day and at said election."

There was no misconduct of the judges of the election proved or pretended except that by the consent of all persons present, candidates and electors, they closed the ballot-box, deposited it in a place of safe keeping, and went away to dinner, at about half past 11 o'clock, remaining absent from one to two hours. It did not appear that any elector had been prevented from voting, or that any injury to any one was caused or intended. There was no dispute (after the court had decided in his favor a question upon the Naturalization Act of April 1802, § 4) that John

Ritt had received a majority of all the votes cast, and unless the election itself was totally void, had been elected.

George E. Pugh, on behalf of Ritt, did not deny that the action of the judges was irregular, but contended that on *quo warranto* the question, after passing behind the certificate of election, was only which of the claimants had, in fact, the highest number of legal votes. And he insisted that inasmuch as the defendant had proved affirmatively that neither the relator nor any one else had suffered any disadvantage, a mere mistake of duty on the part of the judges could not avoid the election.

Mr. *Hoefer* rose to address the court on behalf of the defendant Shonter, the former mayor, but the court intimated that it was not necessary to offer any argument on that side.

Mr. *Crapsey*, on behalf of the relator, said that under this intimation of the court, he would not offer any remarks.

The opinion of the court was delivered by

BRINKERHOFF, J.—It was correctly stated by Mr. Pugh, as a universal law governing all elections, that, throwing aside mere forms, the only question is, who has received the most legal votes? The point as to the want of the signatures of the judges to the papers touched a mere matter of form. The object was only to authenticate the paper, and it was competent to authenticate by other means, as it was by the oath of the recorder. So also, as to the administration of an oath to the judges. They were sworn as a matter of fact, and acted as judges *de facto*.

It was beyond dispute, however, that for about the space of two hours, the judges and clerk of election left the polls and took the ballot-box away, returning afterwards and resuming the election. There is no pretence that the ballot-box was tampered with, but that the judges rather acted in ignorance of what their duties were.

The court is of opinion that such conduct on the part of the judges goes to the substance of the election, and renders it void *in toto*. The statute prescribes that the polls shall be opened at a given hour in the morning and closed at a given hour in the

afternoon. It was the express design of the legislature that all the time between these hours the polls should be kept open for the convenience of any elector who may chose to present his ballot. The court does not agree with counsel that it lies on the party contesting the election to show affirmatively that the closing the polls influenced the result. The law gives the elector the privilege of consulting his own convenience as to what hour of the day he will visit the polls, and it is a fair presumption that if the polls were temporarily closed for dinner, as was proved, a portion of the electors were deprived of that privilege. The writ was, therefore, well brought against Mr. Ritt, who claimed the majority, but the same state of facts also excludes Mr. Brown, the relator, from the office of mayor.

MURDOCK, COX, and FORCE, JJ., concurred.

In the case of *The Penn District Election*, 2 Pars. (Penna.) 533, where the polls, through mistake of the law by the election officers, were closed at 8 o'clock, instead of 10, in the evening, as required by law, the election was held void. The court laid down no definite rule as to how much of a variation was necessary to make the election void; but PARSONS, J., was of opinion that if an election was closed an hour, or even half an hour, before the time fixed by law it should be set aside, unless it appeared, from an examination of the number of votes compared with the tally-lists, that the number left out could not by possibility change the result.

And where the polls were kept open after the proper hour, if enough votes were cast to change the result, the election must be set aside. A legal voter cannot be interrogated as to whom he voted for, although he voted after the proper time of closing the polls; and

therefore the court cannot go into any examination of the votes; it is enough if the votes improperly received could by possibility change the result: *Locust Ward Case*, 4 Penna. Law J. 341.

In Illinois, however, a different rule was laid down, that to make the election void it must be shown that votes were cast after the proper hour for closing the polls which changed the result. It is not enough that the votes thus received, if all of one kind, would change the result: the court will not presume one way or the other, and proof must be made of which side the votes thus cast were for: *Piatt v. The People*, 29 Ills. 54.

But an election will not be set aside because the polls were closed at the hour specified by the Act of Assembly, though a number of legal voters who were present and intending to vote were thereby prevented: *Clark's Case*, 2 Pars. (Penna.) 525. J. T. M.

*Supreme Court of Iowa.*McCRAHER v. THOMPSON *et al.*

Where the principals and three sureties signed a promissory note, after which, and before delivery, by an arrangement between the principals and the surety who *first* signed the note, his name was erased therefrom without the knowledge or consent of the other sureties; and the note was then delivered to the payee in a condition which showed upon its face that the name of the surety who *first* signed the same had been erased; whereupon the note was received with knowledge of the relation of principal and surety existing between the makers: it was *held*: 1st. That the discharge of the surety released the co-sureties who signed the note when his name was upon it. 2d. That the payee received the note under circumstances which would put a reasonably prudent man upon inquiry; and was charged with knowledge of the rights of the co-sureties. It was also *held*, that if the makers of the note were all principals the erasure of the name of one would be a discharge of the others only *pro tanto*.

THE appellants, Thompson and Sawyer, were the sureties of Monett and Chipman, upon a joint note, payable to plaintiff, dated February 1st 1861, due in six months, for \$497.10. Plaintiff had a claim against the "Lee and Des Moines Bridge Company." Monett and Chipman leased the bridge and made this note to pay this debt, which they in such contract of lease had assumed.

Thompson was a stockholder in the bridge company; Sawyer was not. At the time they signed the note, one Tonkinson had signed it—the principal assured them that others would sign. With this understanding they affixed their signatures, and the name of James A. Crabtree was afterward procured. Before the note was delivered to plaintiff (or his attorney) Tonkinson's name was erased or defaced, by an arrangement with the principals, and Crabtree's name was cut off, so that no trace thereof remained.

When the note was received by plaintiff, it is uncertain whether he had knowledge that any of the parties were sureties. He did know, however, for he could see, that Tonkinson's name had been to it. Chipman, the party delivering it, was at the time interrogated as to the erasure, and answered that the parties had consented to it, or that it was done by consent of parties. Appellants did not know that Crabtree actually signed the note, nor that the two names (Tonkinson's and Crabtree's) were erased or cut off until long after it was delivered. They knew that the object in

making the note was to satisfy plaintiff, and to enable the principals and the company to complete their arrangements for leasing the bridge. The names were signed in the following order:—Monett, Chipman, Tonkinson, Thompson, Sawyer. Tonkinson's was erased after Thompson and Sawyer signed. Crabtree signed after, and after the erasure subsequently took his name off; but of such erasure or spoliation Thompson and Sawyer had no knowledge. Upon these facts, under the instructions, the jury found for plaintiff, and the sureties appeal.

J. C. & B. J. Hall, for the appellants.

M. D. Browning, for the appellee.

WRIGHT, J.—The action of the court in admitting the note, without evidence from plaintiff explanatory of its appearance and condition, scarcely demands attention. The subsequent proof so fully and entirely developed the whole transaction, that such preliminary question ceases to be of any importance. Having the entire evidence, appellants' liability or non-liability depends upon the consideration of certain legal propositions, and, these determined, it is of no consequence whether the note was properly or improperly admitted in the first instance. We remark, also, that the material inquiry relates to the erasure of the name of Tonkinson, for his name was to the note at the time the sureties signed it, and was erased afterward, and before the delivery, and without their knowledge or consent; and that it had been erased was known to plaintiff at the time the note was received. Crabtree, on the other hand, signed it after they did, and plaintiff had no knowledge or intimation that he had so signed. If the circumstances attending the Tonkinson signature, therefore, are *not* sufficient to release the sureties, of course those attending Crabtree's would not; and if they *are* sufficient, the defence is probably fatal to plaintiff's right to recover, and the judgment must be reversed. So that, in any event, we may confine ourselves to the effect of the Tonkinson erasure, for, whatever the conclusion, it, in one view at least, becomes decisive of the whole case.

We are left to presumption as to the time the erasure was made. That it was made *before* the note was delivered to the payee, is one of the conceded facts of the case. If the alteration or erasure had taken place *after* its issue, *after* the note had come

to plaintiff's hands, very different questions would arise: *Hall v. McHenry*, 19 Iowa 521. Made before, he having knowledge that it was made at some time prior and by some one, the question is whether, as a prudent man, he was justified in taking the note without making other and further inquiries than he did; and whether, taking under the circumstances disclosed in the testimony, he is protected as an innocent holder. And this involves the somewhat correlative inquiry, whether, after the sureties had signed the note and intrusted its delivery and the consummation of the contract to the principals, they must suffer the consequences of this change or erasure, or whether the law imposes upon the payee the duty of ascertaining for himself the actual circumstances attending the same; and whether, after being put upon inquiry, he fails to follow it up, he should not be treated as having a knowledge of all the facts to which such investigation would have led him.

In the examination of these questions we shall treat plaintiff as a holder for value, or place him in the same attitude as though he had, at the time the note was delivered, paid a full consideration for the same. Whether, under the facts, he should be so regarded we need not determine. For, conceding this much, our opinion is, that the verdict was nevertheless wrong, and that a new trial should have been ordered.

And this conclusion we reach without entering upon the much controverted question of what would be plaintiff's right, if there had been no change in the signatures after the sureties had signed the note, or if it stood alone upon the effect of the representations made by the principals that they would procure other sureties before delivering the note to the payee. We need hardly remark that upon this question there is an irreconcilable conflict in the authorities; and while the writer of this opinion, at least, inclines to concur in the view that the payee of negotiable paper, taking it without notice of such representations or understanding or anything to put him upon inquiry, would not be bound nor affected thereby, and as a consequence that such defence could *not avail*; yet as the question does not arise, it is left open for future consideration. In some of the recent cases, it has undergone a very full discussion. Among others we refer to *Willet v. Parker*, 2 Metc. (Ky.) 608; *Bank of Missouri v. Phillips*, 17 Mo. 29; *Dardoff v. Forseman*, 24 Ind. 481, all holding that

such defence would not be available. *Contra*, see *People v. Bostwick*, 43 Barb. 9; s. c. 32 N. Y. 445; *Perry v. Patterson*, 5 Humph. 133. In addition to these we have examined the following cases and authorities, all bearing with some directness upon the question here involved: *Bibb v. Read*, 3 Ala. 88; *Hatcher v. Austin*, 11 Verm. 447; *Black v. Lamb*, 1 Beasley (N. J.) 108; *Bank v. Evans*, 3 Green (N. J.) 155; *Johnson v. Baker*, 6 Eng. L. & Eq. 479; *Leaf v. Gibbs*, 4 C. & P. 464; *Sharp v. United States*, 4 Watts 21; *Chouteau v. Suydam*, 21 N. Y. 179; *Fay v. Richardson*, 7 Pick. 91; *Greaves v. Neiber*, 10 S. & M. 9; *Cumberledge v. Lawser*, 40 Eng. L. & Eq. 228; *Pawling v. United States*, 4 Cr. 219; *Corbett v. Miller*, 43 Barb. 305; 2 Pars. N. & B. 28; *Pasgumpsie Bank v. Goss*, 31 Verm. 315; *Dixon v. Same*, Id. 450; *Smith v. Doak*, 3 Texas 215; *Hill v. Sweet*, 5 N. H. 168; *Dunn v. Smith*, 12 S. & M. 602; *Nash v. Skinner*, 12 Verm. 219; *Bank v. Kortright*, 22 Wend. 348; *Putnam v. Sullivan*, 4 Mass. 45; *Thurston v. McKown*, 6 Id. 428; *Stover v. Logan*, 9 Id. 59; *Hall v. Fuller*, 5 B. & C. 750; *Charles v. Marsden*, 1 Taunt. 22; *Bank v. Woodworth*, 18 Johns. 315; 1 Pars. N. & B. 110, 112, 232; *Arode v. Dixon*, 5 Eng. L. & Eq. 512; *Lloyd v. Howard*, 1 Id. 227; *Palmer v. Richards*, Id. 529; *Seely v. The People*, 27 Ill. 173; *York Insurance Co. v. Brooks* (and note of Judge Redfield to these two last cases in 2 Am. Law Reg. 346; 3 Id. 402); *Smith v. United States*, 2 Wallace 219; *Goodman v. Eastman*, 4 N. H. 455; *Berry v. Anderson*, 22 Ind. 36; *Pepper v. State*, Id. 399; *Fertig v. Buchu*, 3 Barn. 308; *Fullerton v. Sturges*, 4 Ohio 529; *Nance v. Lary*, 5 Ala. 370; *Montague v. Perkins*, 22 L. & E. 516.

Some of these cases relate to official bonds, some to acceptances in blank, some to bonds of guardians or administrators, others to deeds delivered to third persons to be handed to the grantee upon conditions, some where a name or names had been forged, others where certain names were inserted in the instruments but not signed to the same, some where the payee or obligee knew of the promise to the sureties, while in others they did not. Some make a distinction between negotiable paper and official bonds; others seem to overlook it. In some of them the paper was used for a purpose other than that contemplated, while many of them discuss at great length, fully reviewing the authorities, the liability of

sureties who sign upon the faith and condition that other names are to sign also, the payee having no knowledge of such condition or arrangement.

All the cases of the latter character recognise more or less fully the principle stated in *Lickbarrow v. Mason*, 2 Term R. 73; that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must sustain it. In some of them, however, its applicability is denied; while in others, each party claimed that he was innocent, and that the other had enabled the third person to occasion the injury or loss. In others again, it is insisted that a surety may hand a note to the principal to be delivered to the payee only when others named and agreed upon shall sign it; that in the hands of the principal it is an *escrow*; and that a delivery before the compliance with such conditions is void, and that the payee is not protected. Others, as it seems to me with more reason, deny that a note can thus be held as an *escrow*; maintaining that the promissors are one party, the promisee the other, and that an instrument can only be delivered as an *escrow* to some *third* person. All of the cases, however, where the question arose, hold that if the payee had knowledge of such an arrangement, he would be bound by it, and that the defence would avail those who signed upon the faith of such an agreement, and in like manner none have been found which hold the payee or obligee protected where the circumstances were such as to put him upon inquiry. This rule is recognised, in its negative form at least, in the note of Judge Redfield to the case of *The Insurance Co. v. Brooks*, 3 Am. Law Reg. 402, where he says: "It seems to us, upon principle, that where there is nothing upon the face of the paper indicating that other co-sureties were expected to become parties to the instrument, and no fact brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made the inquiry before accepting the security, the fault cannot be said to rest, to any extent, upon the obligee." Of course the conclusion is legitimate, that if there was sufficient to put him upon his guard, or such information as would naturally lead him to make inquiry, the obligee would be in fault, and should sustain the loss if any arises. Again, he says (2 Am. Law Reg. 347): "The surety must

run the risk of the fraud of his own agent, unless there is something *upon the face of the paper* to show that other parties were expected to sign it. The payee may be affected and put upon inquiry by notice *in pais*, however, as well as by some indication upon the instrument itself. In most of the cases it will be found that this inquiry was naturally suggested by the paper itself. See *Thatcher v. Austin*, 11 Verm. 447; *Pawling v. United States*, 4 Cranch 219; *Duncan v. United States*, 7 Pet. 435. In one case the rule is thus stated: "An estoppel (against the sureties) does not exist in such cases, where there are circumstances calculated to put the obligee upon inquiry, or that may operate as notice of the imperfect condition of the instrument; for in such case, the obligee does not stand as an innocent party; his own negligence is the proximate cause of the injury he sustains:" *Pepper v. The State*, 22 Ind. 419; and see *Berry v. Anderson*, Id. 36; *Swan v. The North Brit. Austr. Co.*, 10 Jur. 102 (7 C. B. 400).

Whether the principal violates his agreement to obtain the other names promised; whether he fills a blank acceptance for more than was agreed; whether he appropriates the note, to the sureties' injury, to another purpose than that contemplated; in any or all these cases, it must be conceded that as between them it would be manifestly unjust and inequitable to hold the surety liable. The surety may most truthfully say "*non veni in hoc vinculo*." The difficulty in all such cases arises when the rights of third persons intervene.

When we come to consider these, however, it must be remembered that the law imposes the obligations of good faith and diligence, upon a payee as well as upon a promissor or obligor. Neither can protect himself from the consequences of his own negligence. And where one has acted in good faith and exercised due diligence, and the other is fairly and naturally put upon inquiry and fails to follow it up, the latter cannot say we are equally innocent. If he accepts an instrument incomplete upon its face, and giving clear indications that it has been changed, he cannot in justice and truth say, I am innocent, and the surety must recover for any injury he has sustained against the principal for his fraudulent misconduct.

In our investigations we have found no case precisely like that before us. Upon principle, however, the analogy is clear enough.

Here was a *joint note*. When presented to the payee, one of the names was obliterated or erased. This could be seen, was seen and talked about. This name was prior in place to those of the present appellants. It was there clearly and unquestionably when they signed it. Appellee knew, therefore, that the name of Tonkinson was at one time to this note. He knew it just as well as though all the names of the promissors had been recited in the body of the note, and one of them (say Tonkinson) had failed to sign it. In such a case there is but little if any question, under the authorities cited, as to the rights of the other promissors, and the duty of diligence on the part of the payee. In the absence of fraud both parties in such a case *may stand upon the facts*, and their rights are to be adjudged accordingly. For if the inquiry thus suggested had been followed up, appellee would have learned the true state of the case, and knowing this there could be no pretence of a right to recover.

The note then being in this condition, he was put upon inquiry. Thus situated, did he manifest the diligence required by law? He inquired of the principal, who advised him "that the parties had consented to it." This was untrue, and plaintiff was not justified in relying upon such representations. If the act of erasing the name of one of the sureties, without the consent of the others, would not conclude those not assenting, most clearly a representation of this kind would not. Plaintiff's duty, being put upon his guard, was to go to a source where he could certainly learn the truth—to those who, failing to indicate their dissent, would be thereby estopped.

But if he could simply rely upon the assertion of the principal under the circumstances, so he might if the appellants' names had been forged, and he relied upon the principal's averment that they were genuine. We have found no case going so far as to conclude the other promissors by the act or representation of one, where the instrument contains upon its face matter calculated to put the payee upon inquiry. And it must be very clear that to hold them so bound would destroy all right or protection resulting to them from the incomplete nature of the instrument. For, by such misrepresentations, made by an interested party, it would become invested with all the sanctity and validity of the most perfect and regular paper or writing. For the most obvious reasons this cannot be the rule.

The foregoing views of the law are based upon the supposition that plaintiff knew at the time he received the note that appellants were but sureties, and that Monett and Chipman were the principals. Whether he had this knowledge is a question of fact which should be submitted to the jury under the testimony. The instructions do not seem to have regarded this inquiry as very material, nor to have discriminated with entire clearness between appellants' rights, if known as sureties, instead of standing as principals in common with the other makers. And in a case so important to the parties, involving questions so difficult and somewhat novel in this state, we have had the less hesitation in ordering a new trial, that the attention of the jury might, under proper instructions, be directed to this distinction and to these inquiries.

If plaintiff or his agent, when taking the note or before, knew that appellants signed the note as sureties, then the rules above stated and recognised should be given to the jury for their guide. Of course, if this was not known, but as far as he knew or had reason to know they were all principals, then this erasure would not operate to discharge appellants entirely, but only *pro tanto*. That is to say, they would still be liable for their proportion of the debt, and to that extent plaintiff would be entitled to recover.

We only remark, in conclusion, that there was no evidence tending remotely to show that appellants, or either of them, had made any payment upon this note. The instructions based upon such assumption were therefore erroneous.

Because of this, and because the law was not properly given to the jury upon the main issue involved, as above indicated, the cause is reversed, and remanded for trial *de novo*.

Reversed.

United States District Court. Western District of Pennsylvania. In Bankruptcy.

IN THE MATTER OF HUGH CAMPBELL, A BANKRUPT.

Congress, by the Constitution of the United States, had the right to bring all parties, estates, and interests connected with a bankrupt into the District Court of the United States as a Court of Bankruptcy.

And to confer upon the District Courts the authority to suspend all and every proceeding elsewhere; and to command obedience to their mandates, exclusive of all other jurisdictions.

But, by the Bankrupt Act of the 2d March 1867, they have not done so.

This act does not authorize the District Courts of the United States to issue injunctions to state courts, nor to the actors or parties litigating before them.

The Act of 2d March 1793, prohibits it; and this act is not repealed by the Bankrupt Law, either in express terms, or by implication.

Courts of a state are independent tribunals, not deriving their authority from the same sovereign, and as regards the District Court of the United States, foreign tribunals, every way its equal, and over which the District Court has no supervisory power.

The Bankrupt Law does not change the relation of these courts to each other.

The authority conferred by the 40th section, to issue an injunction against the bankrupt, and all other *persons*, has no reference to the state courts, and it is a limitation of the sweeping provisions of the 1st section.

It was designed to protect the property of a party not yet declared a bankrupt, until his bankruptcy has been legally established.

Liens, by the Bankrupt Law, are held sacred, and the creditor is expressly protected by the 14th, 15th, and 20th sections of the act.

The bankrupt's final certificate discharges his person and future acquisitions; but the lien-creditor is entitled to satisfaction out of the property subject to lien.

Patterson, for the injunction.

Golden and Foster, contra.

The opinion of the court was delivered by

M'CANDLESS, J.—I feel the grave responsibility which attaches to the decision about to be announced. In construing a new and untried statute, and establishing the practice to be observed in its proper administration, there must necessarily be much diversity of opinion among both lawyers and judges. The interests involved are frequently so large and the principles so important, that inextricable confusion must result from an unsound interpretation of the legislation of Congress. This Bankrupt Act is highly beneficial to both the debtor and the creditor. It was

designed to relieve the one from oppressive liabilities, which render him unfit to contribute to the productive wealth of the country ; and it affords to the other an assurance that all the property of the debtor, except what from motives of humanity he is permitted to retain, shall be honestly devoted to the payment of his debts. With a fraudulent debtor it is wisely and justly stringent, compelling a full discovery and surrender of his assets, for the benefit of his creditors under peril of imprisonment for contempt—a penalty not to be disregarded.

The present is a case upon creditors' petition to declare Hugh Campbell a bankrupt. Numerous acts of bankruptcy have been assigned, all of which are denied, and a trial by jury awarded. Many judgments of large amount, the validity of which is not questioned, have been entered in the Court of Common Pleas of Armstrong county ; and they are all prior in date to the period when the Bankrupt Law went into operation. Upon final process, a sale of real estate by the sheriff has been made, and \$29,290 realized and brought into court for distribution. Under these circumstances our extraordinary power of injunction was invoked to restrain not only the plaintiffs in these judgments, but the courts of the state and their executive officers, from further proceeding, with the design to bring all the property of the bankrupt into this court, as a Court of Bankruptcy, for division among all his creditors. The injunction against the sheriff and the parties was granted, with leave, *instantly*, for a motion to dissolve, that we might ascertain whether, under the Bankrupt Law, we have the right to interfere with the courts of the state in the legitimate exercise of their functions.

After much reflection I am satisfied we have not—nor with the actors or parties litigating before them.

The first section of the act is wide in its scope, and would seem to bring all parties, estates, and interests connected with the bankrupt into a common forum or centre. And to do so, it is contended that Congress, by implication, conferred upon the District Courts of the United States the authority to suspend all and every proceeding elsewhere, and to command obedience to their mandates, exclusive of all other jurisdictions. This, by virtue of the 5th clause of the 8th section of the 1st article of the Constitution of the United States, granting the power “to establish uniform laws

on the subject of bankruptcies throughout the United States," Congress had the right to do—but they have not done so.

Staring them in the face was the Act of the 2d of March 1793, § 5th, expressly declaring, "nor shall a writ of injunction be granted to stay proceedings in any court of a state." There is nothing in the Bankrupt Law in terms repealing this statute, and the authority conferred by the 40th section to issue an injunction against the bankrupt and all other *persons*, excludes the presumption that it is to be exercised without limitation. Other "*persons*," here expressed, has reference to parties interfering with the property of an individual not yet adjudicated an involuntary bankrupt, and which is to be preserved inviolate, until his bankruptcy has been legally ascertained. It does not refer to the courts of a state, or to their executive officers. It was not designed to arrest the whole machinery of another and independent forum, which is exercising its best efforts to marshal the assets of the debtor, and after discharging the legitimate liens to which they are subject, reserving the residue as a fund for the assignee in bankruptcy.

Liens by this law, as they should be, are held sacred. To say that the vigilant creditor, who by his diligence has secured his debt, and has a valid lien upon the property of the bankrupt, shall come in with all the other creditors *pro rata*, would be a perversion of the purposes of Congress in the passage of the act. No right acquired by the creditor is affected or impaired. The 14th section expressly protects him. The assignee has authority, under the direction of this court, to discharge any *lien* upon any property, *real* or personal, and is authorized to sell the same *subject* to such lien or other encumbrances. By the 15th section he is permitted to sell all *unencumbered* estates, real and personal, on such terms as he thinks most for the interest of the creditors. Where there is a *lien* on real or personal property, the 20th section admits the holder of the lien as a creditor in bankruptcy for the *balance* of the debt, after deducting the value of the property, to be ascertained by agreement or sale; or the creditor may release or convey his claim to the assignee, and be permitted to prove his *whole* debt in bankruptcy.

These several sections are distinct recognitions by Congress of the sanctity of liens, obtained before the inception of proceedings

in bankruptcy, and they control, and are a limitation of the sweeping provisions of the first section. It is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

All liens then remain intact. The bankrupt's final certificate operates to discharge his person and future acquisitions, while, at the same time, the mortgagee or other lien-creditor shall be permitted to have their satisfaction out of the property mortgaged or subject to lien. A legal right without a remedy would be an anomaly in the law: 7 How. 623.

It is true that the first section of the act declares that the jurisdiction conferred on the District Court of the United States shall extend to "all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy." But as the Supreme Court of the United States say, in the case of *Peck v. Jenness*, before quoted in 7 Howard, the Court of Common Pleas of Armstrong county has full and complete jurisdiction over the parties and the subject-matter; and its jurisdiction had attached long before any act of bankruptcy was committed. It is an independent tribunal, not deriving its authority from the same sovereign, and, as regards the District Court, a foreign forum, in every way its equal. The District Court has no supervisory power over it.

When the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but in necessity. For if one may enjoin the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or *other process*, for this would produce a conflict of jurisdiction extremely embarrassing in the administration of justice. The fact, therefore, that an injunction issues only to the *parties* before the court and not to the court itself, is no evasion of the difficul-

ties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.

It follows, therefore, that this court has no supervisory power over the Court of Common Pleas of Armstrong county by injunction or otherwise, unless it is conferred by the Bankrupt Law. But we cannot discover any provision in that act which limits the jurisdiction of the state courts, or confers any power on the Bankrupt Court to supersede their jurisdiction, or wrest property from the custody of their officers. On the contrary it provides, in the 14th section, that the assignee "may prosecute and *defend* all suits at law or in equity, pending at the time of the adjudication of bankruptcy, *in which such bankrupt is a party*, in his own name, in the same manner and with *the like effect*, as they might have been prosecuted or defended by such bankrupt." In other words, as to the estate and property of the bankrupt, the assignee is subrogated to all his rights and responsibilities. The act sends the assignee to the state court, and admits its power over him. It confers no authority on this court to restrain proceedings therein, by injunction or other process, much less to take property out of its custody or possession with a strong hand.

Finding no such grant of power, either in direct terms or by necessary implication, from any of the provisions of the Bankrupt Law, we are not at liberty to interpolate it on any supposed grounds of policy or expediency. We shall therefore be compelled to dissolve this and all other injunctions in similar cases.

I have not submitted this opinion to my brother GRIER; but it may be a source of gratification to the profession to learn that, sitting with him recently, at Circuit in Philadelphia, we conferred upon this case, and I am pleased to say that we concurred in the legal principles upon which it should be decided.

Injunction dissolved.

United States District Court. Western District of Pennsylvania. In Bankruptcy.

IN THE MATTER OF WILLIAM BURNS.

The principle decided in *Campbell's Case*, that the District Courts of the United States have no power to issue injunctions to state courts, affirmed.

A judgment cannot be assailed in the Bankrupt Court, but the assignee and creditors must resort to the state court, to test its validity.

Purviance, for the Clarion Bank.

Marshall, for the Sheriff of Jefferson county.

Shiras, for the bankrupt and general creditors.

The opinion of the court was delivered by

M'CANDLESS, District Judge.—This case was argued at the same time with that of Hugh Campbell, and the principal point presented has been there decided.

It differs in this—Burns is a voluntary bankrupt. His petition was filed on the 31st of July 1867, and he was duly adjudged a bankrupt. The First National Bank of Clarion, a creditor of the firm of which the bankrupt was a partner, on the 18th of July 1867 obtained judgment on warrant of attorney dated 9th of July of the same year, for the sum of \$10,300. A *fi. fa.* was issued and a levy made by the sheriff of Jefferson county on merchandise and lumber, at what date, from the imperfection of the paper-book, this court is unable to say, but prior in date to the commencement of the proceedings in bankruptcy.

It was alleged at the argument, that the note on which this judgment is predicated was given under promise not to sue out a writ of execution, but to be held as a security, and to afford the firm of which the bankrupt was a partner, an opportunity to make some arrangement with their creditors. That in violation of this agreement, and in fraud of the 35th section of the Bankrupt Law, the judgment was entered, execution was issued, and levy made. Before the date fixed by the sheriff for his sale, we were asked, by petition, to enjoin the Clarion Bank and the sheriff from proceeding further with their writ, and directing them to deliver the property upon which the levy was made to the assignee in bankruptcy. This we did; at the same time admonishing the counsel

of the doubts entertained as to the power of this court, and suggesting a motion to dissolve, which was granted. Upon this point they have been fully heard, and the question has been decided to-day in Campbell's Case.

It was urged with great force and ability by the counsel for the bankrupt, that we were bound to interfere by injunction, because this was not a *valid* judgment. But how do we know that? It is entered in a court of competent jurisdiction, whose authority it is our duty to respect. If it is fraudulent or void under the Bankrupt Law, it is the province of the assignee in bankruptcy, who stands in the attitude of a defendant, to see, in that forum, that no injustice is done to the general creditors.

By the 1st section of the 4th article of the Constitution of the United States, it is declared that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;" and this is equally binding on the Courts of the United States.

We must, therefore, refer the assignee in bankruptcy, as the representative of the defendant, and of all the creditors, to the Court of Common Pleas of Jefferson county.

Injunction dissolved.

Supreme Court of Pennsylvania.

HARTLEY & MORRIS'S APPEAL.

To impart an irrevocable quality to a power of attorney, in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power, an interest in the thing or estate to be disposed of or managed, under the power.

In a power of attorney constituting an ordinary agency to enforce settlement of an administrator's account, and to collect any moneys or property that might belong to grantor, a clause allowing the attorneys to have for their services one-half of the net proceeds of what they might recover or receive, does not render the power irrevocable.

APPEAL from the Orphans' Court of *Greene county*.

Downey, for plaintiff in error.

Purman, contra.

The opinion of the court was delivered by

THOMPSON, J.—There was no error committed by the court below in holding the power of attorney of Hannah Gallion to the appellants to be revocable. It was an ordinary agency, constituted by letter of attorney to act for her, to enforce a settlement of his accounts by the administrator of her father's estate, in which she was interested, and to collect any moneys or property that might belong or be coming to her. For these services the attorneys were to have one-half the net proceeds of what they might recover or receive for her. The plaintiffs in error suppose that this clause rendered the power irrevocable by their principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney, in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power an interest in the thing or estate to be disposed of or managed under the power. An instance, of frequent occurrence in practice, may be given of the assignment of vessels at sea, with a power to sell on return for the benefit of the holder of the power, or of anybody else who may have advanced money, and who it was agreed should be secured in that way. So, when securities have been transferred, with a power to sell, and generally, I presume, in all cases of property pledged for the security of money, where there is an accompanying authority to sell to reimburse the lender or creditor. In *Hunt v. Rousmanier*, 8 Wheat. 400, this doctrine is clearly and forcibly elucidated in the opinion of MARSHALL, C. J. In *Bancroft v. Ashhurst*, 2 Grant 513, a case tried at Nisi Prius before me, at which my brethren sat as advisers, there is a pretty full examination of the question herein involved, and all the authorities referred to, and the conclusion is fully in accordance with *Hunt* and *Rousmanier*, and sustains the above view of a power coupled with an interest.

In the case in hand the power and the interest could not co-exist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would, *ipso facto*, extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended. This distinction is noticed in *Hunt v. Rousmanier*; but neither by this test, nor any other, was the power of attorney in question irrevocable, and the judgment must be affirmed.

Judgment affirmed.

Supreme Court of Pennsylvania.

BLACKSTONE v. BUTTERMORE.

In order to make an agreement for irrevocability, contained in a power to transact business for the benefit of the principal, binding on him, there must be a consideration for it independent of the compensation to be rendered for the service to be performed.

Where, in a power with a clause of irrevocability, the agreement was to give the agent a certain sum and portion of the proceeds of the sale he was authorized to make, for his compensation, and he expended time, labor, and money thereunder, the power was not thereby rendered irrevocable.

For the time, labor, and money expended, a revocation would leave the principal liable on his implied *assumpsit*.

Hartley & Morris's Appeal (ante, p. 106), cited and approved.

ERROR to Common Pleas of *Fayette county*.

Patterson, for plaintiff in error.

Kaine, contra.

The opinion of the court was delivered by

AGNEW, J.—We have decided the substantial point of this case, at the present term, upon the *Appeal of Hartley & Morris*, from the Orphans' Court of Greene county, opinion by THOMPSON, J. A power of attorney, constituting a mere agency, is always revocable. It is only when coupled with an interest in the thing itself, or the estate which is the subject of the power, it is deemed to be irrevocable; as where it is a security for money advanced, or is to be used as a means of effectuating a purpose necessary to protect the rights of the agent, or others. A mere power, like a will, is in its very nature revocable when it concerns the interests of the principal alone; and in such case even an express declaration of irrevocability will not prevent revocation.

An interest in the proceeds to arise as mere compensation for the service of executing the power, will not make the power irrevocable. Therefore it has been held that a mere employment to transact the business of the principal is not irrevocable without an express covenant founded on sufficient consideration, notwithstanding the compensation of the agent is to result from the business to be performed, and to be measured by its extent: *Coffin v. Landis*, 10 Wright 426. In order to make an agreement for irrevocability, contained in a power to transact business for the benefit

of the principal, binding on him, there must be a consideration for it, independent of the compensation to be rendered for the service to be performed. In this case the object of the principal was to make sale solely for his own benefit. The agreement to give his agent a certain sum, and a portion of the proceeds, was merely to sell. But what obligation was there upon him to sell, or what other interest beside his own was to be secured by the sale? Surely his determination to sell for his own ends alone, was revocable. If the reasons for making a sale had ceased to exist, or he should find a sale injurious to his interests, who had a right to say he should not change his mind? The interest of the agent was only in his compensation for selling, and without a sale this is not earned. A revocation could not injure him. If he had expended money, time or labor, or all, upon the business intrusted to him, the power itself was a request to do so; and on a revocation would leave the principal liable to him, on his implied assumption. But it would be the height of injustice if the power should be held to be irrevocable, merely to secure the agent for his outlay or his services rendered before a sale.

The following authorities are referred to: *Hunt v. Rousmanier*, 8 Wheat. 184; Story on Agency, §§ 463, 464, 465, 468, 476, 477; Paley on Agency 155; 1 Parsons on Contracts 59; *Irwin v. Workman*, 3 Watts 357; *Smyth v. Craig*, 3 W. & S. 20.

The judgment is therefore affirmed.

*Circuit Court of the United States. Eastern District of
Pennsylvania.*

**BRETTAUGH v. THE LOCUST MOUNTAIN COAL AND IRON
COMPANY.**

Where the owner of an unseated tract, lying partly in county S., procures a survey, and returns to the county commissioners for taxation a description of the land as 55 acres lying in S. county, part of a tract containing 349 acres, the residue lying in N. county, with the warrantee's name, and it is so assessed, and the taxes are paid for two years, and in the following year the assessment is so changed in name and quantity that the owner, seeking to pay the taxes, is unable to ascertain that the tract is taxed, and therefore does not pay the tax, a sale for such taxes does not pass the owner's title.

THIS was an ejectment for one-third of 55 acres in Schuylkill

county, tried before GRIER, J., at the October Sessions 1867, of the Circuit Court of the United States.

The plaintiff showed a warrant to Wm. Elliott in 1793, a survey, return and patent. A deed in 1829 for an undivided interest in this and twelve other tracts to Henry Paul Beck: an assessment for Butler township, Schuylkill county, for 1850 and 1851, thus:—

“Beck, Paul. 200 acres @ 10, 2000,” followed by a treasurer’s sale, in 1854, regular in form, for the taxes of 1851–2, and title from the purchasers to the plaintiff, with proof as to the identity of the tract taxed with that surveyed under the Wm. Elliott warrant.

The defendants showed title under the Wm. Elliott warrant and that they were in possession since 1853, making valuable improvements.

There was no evidence that the tract had ever been assessed in Schuylkill county prior to 1848. In that year the owner, under whom defendants claimed, employed a surveyor to survey and return for taxation the thirteen tracts (known as the Beck lands), lying in the three counties of Northumberland, Columbia, and Schuylkill. The surveyor returned a list of the lands to the county commissioners in which this tract was set forth thus:—

	in Northumberland county.	in Columbia county.	in Schuylkill county.	Total.
“William Elliott. ———	289. ¹¹⁸	55. ¹⁶¹	344. ²⁷⁹	

In 1848 the assessor’s book for Barry township, Schuylkill county, showed the tract was assessed thus:—

“William Elliott. 55 as. $\frac{161}{1000}$ part of $344\frac{279}{1000}$ 275. $\left| \begin{array}{c} \text{Co. tax.} \\ 82 \end{array} \right| \begin{array}{c} \text{St. tax} \\ 82 \end{array} \right|$
The residue being in Columbia county. See paper filed.”

In 1849 the assessment was the same.

In March 1850, an agent of the owners, who had been employed to see to this return, paid the taxes for 1848–9, with interest, &c.

In 1850, the assessor’s books showed, under the unseated list, an entry of a tract with the quantity and gross valuation carefully erased.

There was some reason to believe that with the aid of a powerful glass traces of the name “William Elliott,” could be seen under the cancellation.

Between this and the line next above was the assessment Beck Paul, &c., under which the plaintiff claimed.

The assessment of 1851 was similar but without any erasure.

There was very clear proof this erasure and the insertion of the name Beck Paul had been done by the consent of the assessor before the return of the assessment.

It was shown that in 1853 the owners of the lands were told by their agent, in reply to inquiries, that he could learn nothing about the tax. But it also seemed evident that his inquiries had been confined to the supervisor.

In February 1853 the owner wrote to the attorney who had had charge of the return for taxation in 1848, to inquire about the taxes, stating there were taxes for two years due. In reply he was told by the attorney that he could not find anything to be due, that the land had not been assessed.

Within that year the owner again returned this tract for taxation in Schuylkill county, with a description similar to that made in 1848, and it was so assessed and continued to be so till put on the seated list in 1854, since which the taxes had been regularly paid.

It was also in evidence that in 1855 the tract, although properly assessed for 1854 in the name of Wm. Elliott, was sold to the commissioners for the taxes of 1853-4, assessed under the name of Beck Paul. This sale was redeemed in 1859 by the defendants.

T. E. McElroy and Parsons, for the plaintiff, contended that the only question was the identity of the land sold with that assessed under the name of Beck Paul, as it was shown he had once been an owner, and the lands were known by his name at the time of the assessment and the taxes had not been paid.

McMurtrie and Hughes, for the defendants, contended that where the owner had done his duty in returning the land for taxation and had seen them properly assessed, if, by reason of a change in the form of the assessment, he was misled and induced to believe the land had not been assessed, and was thereby prevented paying the taxes, the assessment was not such as warranted a sale for unpaid taxes; and on this they cited *Dunn v. Ralyea*, 6 W. & S. 479; *City v. Miller*, 13 Wright 455; *Baird v. Carson*, 5 W. & S. 540; *Larimer v. McCall*, 4 Id. 133; *Williston*

v. *Colkit*, 9 Barr 38; *Laird v. Heister*, 12 Harris 458; *Com. Bank v. Woodside*, 2 Id. 404; *Denison v. Snodgrass*, 6 Id. 154; *Gibson v. Snodgrass*, 9 Watts 159.

GRIER, J., instructed the jury the question was one of fact. Such a change in the assessment after a return and an assessment accordingly, without notice to or knowledge by the owner of the change, whether this was through the fraud or folly of the assessors, and it mattered not which, vitiated the sale as against the owner who had been misled, and endeavored to pay his taxes but failed to discover them on the list, after having complied with the requisition of the law and given the officers of the Commonwealth full information to enable them to tax the land properly.

The jury found for the defendants.

Court of Appeals of New York.

SARAH L. COOK, RESPONDENT, v. SAMUEL M. MEEKER ET AL,
APPELLANTS.

Where a sum is left by will in trust, with a direction that the interest and income shall be applied to the use of a person, such person is entitled to the interest from the date of testator's death.

Especially is this so where it appears to have been the intent of the testator that the legacy should be paid by a transfer of bonds bearing interest at the time of his death.

THE appellants were executors of the will of Joseph Conselyea, and separate trustees of certain sums given by the will for the use of certain beneficiaries therein named.

By the seventh clause of the will the testator gave and bequeathed the sum of \$8000 upon trust to invest the same on bond and mortgage, and apply the interest and income thereof to the use of his granddaughter Sarah Cook, the plaintiff herein, during her natural life.

The testator declared, that in case any claim should be presented and allowed against his estate in favor of Dr. Chauncey L. Cook, that the same should be paid rateably out of the principal of several sums given to his grandchildren, one of whom was

the plaintiff. He authorized and empowered his executors to pay and discharge the several legacies and bequests made in his will, or any or either of them, by transferring and delivering to the several legatees such bonds and mortgages belonging to his estate, to be selected by his executors, as might amount either severally or collectively to the legacy paid off.

In addition, the following facts were found by the court which tried the case without a jury. That the testator died on the 10th of October 1856, and that letters testamentary were issued to the defendants on the 20th of December in that year. That the testator left bonds and mortgages amounting to the sum of \$39,121, and that they were drawing interest at the time of the testator's death. That the amount of the legacies and bequests was \$21,000 given by the will; that there were no debts against the estate except the demand of Dr. Cook, mentioned in the will; that the estate was ample to pay all legacies; that there was a large real and personal estate drawing interest; that the executors took possession and control of said estate from the time of the testator's death; that the bonds and mortgages set apart for the payment of these bequests were part of the estate left by the said testator, and were drawing interest at and from the time of the testator's death; that on the 3d day of June 1857, Dr. Cook presented to the executors a claim against the testator, duly verified, amounting to \$426, which was afterwards allowed by them, and paid to him on the 19th of December 1857; that by the terms of the will three-sevenths of this claim, amounting to the sum of \$116.18, were directed to be paid out of the principal sum of \$3000 bequeathed to the use of the plaintiff.

That on the 19th of December 1857, the defendant Meeker received from the executors, for the use of the plaintiff and her sister Ann for life, the sum of \$5767.64, of which \$5691 was in mortgages and \$76.64 in cash.

The plaintiff claimed the interest on said sum of \$3000, from the time of the death of the testator, and the defendants insisting that she was only entitled to the interest and income thereof from the 19th day of December 1857.

The judge at special term held that the money bequeathed to the use of the plaintiff was a legacy, and was not payable until the expiration of one year from the granting of letters testamentary, and that the plaintiff was not entitled to interest thereon

prior to December 20th 1857. Judgment was entered dismissing the complaint, and an appeal to the General Term reversed the judgment and ordered a new trial. From this order the defendants have appealed to this court, and stipulated, that if the order appealed from is affirmed, that judgment absolute shall be rendered against them.

J. H. Reynolds, for appellants.

S. C. Pinckney, for respondents.

DAVIES, C. J.—There does not appear to be much difficulty in adjusting the rights of the parties, and the defendants would have been held blameless if they had acquiesced in the judgment of the General Term of the Supreme Court, that the plaintiff was entitled to the income of the same, set apart by the testator for her support and maintenance, from the time of the death of the testator. The amount in controversy hardly justified them in subjecting the plaintiff, or the estate they represent, to the delay and expense of an appeal to this court.

A bare reading of the will shows that the testator had two classes of beneficiaries in his mind; one to whom he intended to give absolute legacies, and the other those for whose support and maintenance he intended to provide a fund, for which purpose the interest and income thereof were to be applied. In the former class, was the bequest of the sum of \$6000 to his wife, the sum of \$2000 each to the two children of his son William, the sum of \$3000 each to his two grandchildren Anna L. Baker and Micajah R. Pinckney. In the latter class, is the bequest of the sum of \$4000, the interest and income of which was to be paid to his wife during her natural life; the sum of \$5000, the interest and income of which was to be paid to his daughter, married, during her natural life; the sum of \$5000, the interest and income of which was to be applied to the use of his grandson Joseph Cook during his natural life; the sum of \$3000, the interest and income of which was to be applied to the use of his granddaughter Anna Cook during her natural life; and the sum of \$3000, the interest and income of which was to be applied to the use of his granddaughter Sarah Cook, the plaintiff, during her natural life.

By the provision of the Revised Statutes, no legacies are to be

paid until after the expiration of one year from the time of granting letters testamentary, unless the same are directed by the will to be sooner paid: 2 R. S., p. 90, § 43. This is an affirmation of the doctrine of the common law, and has not changed the rule as to the time when interest on legacies begins to run: 3 Brad. Rep. 364.

At common law, the general rule is that interest upon a legacy is payable only at the expiration of a year from the testator's death: Toller on Ex. 324; *Bradner v. Faulkner*, 12 N. Y. Rep. 472. If, however, an annuity be given, or if by implication from the terms of the instrument the legacy be given for maintenance and support, it shall commence immediately from the death of the testator, and consequently the first payment shall be made at the expiration of the year next after that event: Toller on Ex. 324; *Bradner v. Faulkner*, *ubi supra*; 6 Vesey 539; 6 Paige 300. A learned author on the duties of executors (2 Williams on Ex. 1288), says: "This rule as to the payment of interest is subject to an exception, in case of the testator being a parent, or *in loco parentis* of the legatee: citing *Ackerly v. Vernon*, 1 P. Wms. 783; *Hill v. Hill*, 3 V. & B. 183; *Mills v. Roberts*, 1 Russ. & M. 555; *Leslie v. Leslie*, Cas. Temp. Sugd. (Lloyd & Goold) 4; *Rogers v. Souther*, 2 Keen 508; *Wilson v. Maddison*, 2 Y. & C. Ch. C. 372; *Russell v. Dickson*, Dr. & W. 133. For there, whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy shall be allowed as a maintenance from the time of the death of the testator, if there is no other provision for that purpose: *Harvey v. Harvey*, 2 P. Wms. 21; *Inledon v. Northcote*, 3 Atk. 438; *Chambers v. Godwin*, 11 Ves. 2; *Brown v. Temperly*, 3 Russ. Ch. Cases 263; even though the will should contain an express direction that the interest shall accumulate: *Mole v. Mole*, 1 Dick. 310; *McDermott v. Kealey*, 3 Russ. Ch. Cases 264, note; *Wynch v. Wynch*, 1 Cox 433; *Donovan v. Needham*, 9 Beav. 164; *Rudge v. Wirrall*, 12 Id. 357; *In re Rouse's Estate*, 9 Hare 649.

In *Mills v. Roberts*, 1 Russ. & M. 555, the testator gave legacies to be paid to two minor children, provided they attained the age of twenty-one years, and the question was whether they were entitled to interest on their legacies of £10,000 each, for their maintenance and education during their minorities; and he also gave a legacy to one George Francis Stuart, a minor, for his sole

use and disposal, provided he attains the age of twenty-one. The Master of the Rolls said, the testator appoints two gentlemen to be trustees and guardians of these children, and requests them to attend to their education; and the case of *Branstrom v. Wilkinson* is an authority directly in point, that they are entitled to the interest of the sums given to them until they attain the age of twenty-one, or die under that age. The same principle applies to the legacy to George Francis Stuart.

This is a strong case, showing the extent to which the Court of Chancery in England has carried the doctrine of applying the income or interest of a legacy, payable at a future period, given to a minor for his maintenance and education, even before the time arrives when the legacy is payable.

The weight of authority, undoubtedly, now is in favor of allowing the payment of annuities or incomes to commence at the testator's death. The Chancellor assumes this in *Craig v. Craig*, 3 Barb. Ch. 6, referring to *Gibson v. Bott*, 7 Ves. 96; *Fearn v. Young*, 9 Id. 553; *Rebecca Owing's Case*, 1 Bland. Ch. Rep. 296. The case of *Angerstein v. Martin*, Turn. & Russ. Rep. 232, came before Lord ELDON in 1823. The testator in that case devised his freehold estates to J. Angerstein for life, with remainder to his children in strict settlements, and as to his residuary personal estate he bequeathed the same to trustees, to be invested in the purchase of lands, to be settled in the same manner, with authority to invest the funds in stocks, &c., until the estates could be purchased, the interest or income to go to the same person or persons to whom the rents of the estate would go if the purchase had been made. The tenant for life filed his bill *within the year* after the testator's death, for the purpose of having the question decided, whether he was entitled to the annual interest of the clear residue of the personal estate from the testator's death, or whether the amount of such interest for the first year was to form a part of the capital of the general residue, and which was to be added to the same, and invested, and, upon a review of all the previous cases, it was decided that the interest from the death of the testator belonged to the tenants for life, and was not to be added to the residue for the benefits of those who were entitled to the estates in remainder in the property to be purchased. And in the case of *Hewitt v. Morris*, which came before Lord ELDON a few months afterwards (Turn. & Russ. Rep. 241), the testator

directed his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to A. for life, and after his death the principal to be held upon trust for his children.

The tenant for life was held to be entitled to interest accruing within the year next after the testator's death, upon funds in which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies.

And it is to be observed that, in each of these cases, the interest and income were decreed to commence before the exact amount of principal fund was ascertained. See also *Bickford v. Tobin*, 1 Ves. 308; *Hill v. Hill*, 3 V. & B. 183.

Chancellor WALWORTH in *Williamson v. Williamson*, 6 Paige 304, after a citation and review of the authorities, observes that "the result of the English cases appears to be, and I have not been able to find any in this country establishing a different principle, that in the bequest of a life estate in a residuary fund, and where no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee is entitled to the interest or income of the clear residue, *as afterwards ascertained*, to be computed from the time of the death of the testator. All the cases which appear to conflict with this rule, except the two decided by Sir JOHN LEACH, which are no longer to be considered as authority, will be found to be cases in which the testator had directed one species of property to be converted into another, or the residue of any fund to be invested in a particular manner, and had then given a life estate in the funds as thus converted or invested. In such cases it appears to be consistent with the will of the testator to consider the life interest as commencing when the conversion takes place, or the investment is made, either within the year or at the expiration of that time. But as a year is considered a reasonable time for the executor to comply with the testator's directions as to the conversion or investment, the legatee for life cannot be kept out of the interest or income beyond that period. In the case under consideration, there is no direction for the investment thereof in any particular manner, before the right of the widow to the use thereof for life was to commence, and as it appeared that a great portion of the personal estate was in bonds and mortgages and

other securities, which were drawing interest at the death of the testator, there is no good reason for depriving the widow of the use of the residuary estate for an entire year." These remarks apply with peculiar force to the case now under consideration. There there is no direction for a conversion, but a direction in effect to transfer the bonds and mortgages of the testators, to the amount of the several bequests, in satisfaction of them. These securities were all bearing interest, and it is manifest that it was the intent of the testator that these several beneficiaries should have the interest and income of the amount set apart for them, for their maintenance and education. And the fact that the precise amount of the funds was not ascertained until the expiration of a year from the death of the testator, furnishes no reason why the interest thereon should not be paid to the beneficiary before that time. In *Re Williams*, 12 Legal Observer 179, the surrogate of Kings county allowed interest to an adopted daughter of the testator, on a sum of \$5000 directed to be invested, and the interest to be paid to her during life on the proportionate share of her legacy from the death of the testator, but he refused to allow interest from the same period to the widow of the testator, upon a legacy to be invested and the interest thereof paid to her. In matter of *Fisk's Estate*, 18 Abbt. Pr. Rep. 209, the surrogate of New York in 1865, decided, that annuities, or incomes, and interest upon sums directed to be invested upon trust to pay over interest or income, commence to run from the death of the testator.

The case of *Hillyard's Estate*, 5 W. & S. 30, is quite in point. There the bequest was to the executors in trust to put at interest a certain sum, and apply the interest and income thereof to the sister of the testator. The court held that she was entitled to the interest upon the sum so held in trust during the first year from the death of the testator. It is a significant fact, that the statute law of Pennsylvania, in relation to the payment of legacies, conforms to that of this state, directing their payment at the expiration of a year from the death of the testator. See also, for the same doctrine, *Eyre v. Golding*, 5 Binn. 472.

The authorities would seem abundant, therefore, to sustain the doctrine, that where a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the

testator's death. Especially is this so, when, as in the will under consideration, it appears clearly to have been the intent of the testator that the legacy should be paid by a transfer of bonds and mortgages bearing interest at the time of his death. All the authorities and dicta concur, that under such circumstances the accruing interest upon the securities, from the time of the death of the testator, should go for the use and maintenance of the beneficiary. It follows from these considerations, that the order of the General Term granting a new trial should be affirmed with costs, and in pursuance of the defendants' stipulation, judgment absolute should be rendered for the plaintiff, and the Supreme Court is directed to ascertain the amount due to the plaintiff on the principles of this opinion, and render judgment therefor with costs.

All concurred except GROVER, J., who dissented, and PORTER, J., who, having been of counsel, took no part.

Judgment affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF MASSACHUSETTS.²

SUPREME COURT OF NEW YORK.³

SUPREME COURT OF PENNSYLVANIA.⁴

ACKNOWLEDGMENT OF EXECUTION.

Proof of Identity.—Legal proof of the identity of the persons appearing before an officer for the purpose of acknowledging the execution of an instrument, is necessary, when the officer has no previous knowledge of them. A mere introduction, at the time, is not sufficient: *Jones et al. v. Buck et al.*, 48 Barb.

When this previous knowledge does not exist, the officer must take satisfactory evidence, under the solemnity of an oath or formal affirmation, of the identity of such persons: *Id.*

ARBITRATION.

Agreement to submit to—Liquidated Damages.—An agreement, under

¹ From J. W. Wallace, Esq., Reporter; to appear in 5 Wallace's Reports.

² From Hon. Charles Allen, Reporter; to appear in 13 Allen's Reports.

³ From Hon. O. L. Barbour, Reporter; to appear in 48 Barbour's Reports.

⁴ From P. F. Smith, Esq., State Reporter; to appear in 53 Pa. State Rep.

seal, of submission to arbitration provided that either party who should fail to perform the award should forfeit to the other a certain sum, and that each party should get a surety for the faithful payment thereof. By a separate agreement not under seal, but on the same paper and made on the same day, another person guaranteed the performance of the award, on the part of one of the parties, and the payment of the penalty, in case he should refuse to perform the same. *Held*, that the principal and guarantor could not be joined in one action, under Gen. Sts. c. 129, § 4: *Wallis v. Carpenter*, 13 Allen.

A submission, under seal, to arbitration, can only be revoked by an instrument under seal: *Id.*

Simply proving that an arbitrator was a creditor of one of the parties is not sufficient to invalidate his award: *Id.*

If two persons who have been partners together submit to arbitration all matters between them, and after the commencement of the hearing they and another person with whom they had formed a partnership for transacting a portion of their business submit to the same arbitrators all partnership matters remaining unsettled between them, and under the second submission an award is made fixing a sum as due from the two original partners to such third person, the arbitrators may take such award into consideration in determining the matters in controversy between the original partners, and may award that one of them shall pay the amount thereof to such third person: *Id.*

An agreement of submission to arbitration provided that either party who should fail to perform the award should "forfeit to the other party the sum of fifteen hundred dollars as liquidated damages." By a separate agreement, another person guaranteed the performance of the award, on the part of one of the parties, and agreed to "pay the penalty of fifteen hundred dollars," in case he should refuse to perform the same. *Held*, that the sum of fifteen hundred dollars was to be treated as a penalty, in each agreement, and not as liquidated damages: *Id.*

ASSUMPSIT.

Parol Promise.—During the raid of 1863, whilst the citizens of Pittsburgh were engaged in building defences, the defendant promised the plaintiff, also a citizen, that if he would work on them he would pay him. Notwithstanding the circumstances, the plaintiff was not bound to work gratuitously, and the defendant was liable on his promise: *Smith v. McKenna*, 53 Penna.

This promise was not to answer the debt or default of another; it was an independent undertaking by the defendant on his own account, and writing was not necessary to make it valid: *Id.*

DEBTOR AND CREDITOR.

Vested Remainder.—An estate in vested remainder is liable to debts the same as one in possession: *Nichols v. Levy*, 5 Wall.

Hence, where creditors seek to subject, by bill in equity, to their claims an estate in such vested remainder, and it is decided that they cannot do it, the matter will be considered as *res adjudicata*, if they afterwards try to levy, by execution, on the same property, when, by the death of the tenant for life, it has become an estate in possession: *Id.*

EQUITY.

Injunction.—The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made. It cannot be used to take property from one party and put it into the possession of another; this can be done only by a final decree: *Farmers' Railroad Co. v. Reno, &c., Railway Co.*, 53 Penna.

A preliminary injunction cannot be used to harass or punish a defendant without benefit to the complainant: *Id.*

Interference by Injunction with inferior Tribunals.—With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari*: *Ewing v. City of St. Louis*, 5 Wall.

Therefore, to a bill filed to enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefit to his property from the opening of a street in that city, and setting forth, as grounds of relief, want of authority in the mayor, and various defects and irregularities in the proceedings, a demurrer on the ground that a court of equity had no jurisdiction of the matter, and that the complainant had a plain, adequate, and complete remedy at law, was sustained: *Id.*

A non-resident complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If, in the latter courts, equity would afford no relief, neither will it in the former: *Id.*

GUARDIAN AND WARD.

Investment in Land.—If a guardian of minor children uses his wards' money to purchase land, and takes a deed acknowledging the receipt of the consideration paid by him, "guardian of the minor children" of A., but running to himself, his heirs and assigns, without otherwise referring to his guardianship, this is sufficient to give notice to creditors of the guardian that the land is held by him in trust; and parol evidence is competent to show that in fact the land was purchased with the wards' money: *Bancroft v. Consen*, 13 Allen.

The fact that a guardian has wrongfully invested his wards' money in real estate will not render such real estate liable to be seized on execution by his creditors: *Id.*

HUSBAND AND WIFE.

Married Woman—Donatio causa mortis.—A married woman has power under our statutes to make a valid disposition of specific articles of her separate personal property by a *donatio causa mortis*, without her husband's consent: *Marshall v. Berry*, 13 Allen.

Tenancy by Entireties.—The recent statutes of New York for the better protection of the separate property of married women, have no relation to, or effect upon, real estate conveyed to husband and wife

jointly: *The Farmers' and Mechanics' National Bank of Rochester v. Gregory and Wife*, 48 Barb.

In such a case the wife has no separate estate, but is seised, with her husband, of the entirety; neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate: *Id.*

They hold thus not as joint tenants, or as tenants in common, but as tenants by entireties; and the same words of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety: *Id.*

Where the estate thus held by them is voluntarily converted into money, the same belongs to the husband exclusively, in virtue of his marital rights. And no rule of equity will give the wife the entire amount, as her separate property, to the exclusion of the rights of the husband and of his creditors: *Id.*

In a case where there never was any separate estate or right in the wife, neither the statutes nor the rules of equity, are sufficient to enable her to appropriate the entire property to herself, to the exclusion of the husband's creditors, although they became such during the joint ownership: *Id.*

INSURANCE.

By Trustee—Payment to a Creditor.—One of five trustees of a church edifice, being the agent of an insurance company, accepted a risk in it from another of the trustees to whom the church was indebted, the policy being in the individual name of the insuring trustee, with a proviso that in case of loss the amount should be paid to a creditor of him the insuring trustee, to whom, however, the church was not indebted. The insuring trustee paid the premiums out of his own funds but on account of the parish, and with the assent of the trustees; and the fact of two previous insurances in other companies, where the insurance was made in the name of the proprietors of the church generally, was recited in this policy made in the individual name of the one trustee. A loss having occurred—

Held, that the creditor of the insuring trustee was entitled to recover on the policy; the case showing that the insurance in the form in which it was made, was made with the assent of all the trustees, and it being a matter immaterial to the company (supposing the risk to be the same) whether the person appointed by the insuring trustee to receive the money retained it to his own use or paid it to the trustees: *Insurance Co. v. Chase*, 5 Wall.

LEGAL TENDER NOTES.

Custom of Bankers to pay special Deposits in Coin.—A customer of certain bankers at Washington, D. C., in times when, specie payments having been lately suspended, coin was acquiring one value and currency (paper money) another and less, deposited with them both coin and paper money; the different deposits being entered in his pass-book, the one as "coin" the other as "currency," &c. Debts being at this time payable by law only in coin, the bankers requested their customer to make his full balance coin, which he did. Congress passed, about eight months afterwards, an act making certain treasury notes lawful money for the payment of debts. The depositor went on, depositing "coin," and "treasury notes" then regarded as currency, and both were entered accord-

ingly. He afterwards drew for "coin," for a part of his deposit, and his check was paid in coin. He afterwards drew for "coin,"—the bulk of his coin balance. Coin was refused and tender made of the treasury notes, declared by Congress a legal tender. On suit brought to recover the market value of the coin drawn for—the bank teller having testified among other things that "after the suspension, and particularly after the act making treasury notes a legal tender, his employers uniformly made with customers depositing with them a difference, in receiving and paying their deposits, between coin or specie and paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin, otherwise they paid currency, treasury or bank notes"—the plaintiff offered evidence to show "that the usage and mode of dealing between the said parties as set out in the testimony of the teller was uniformly used and practised by all the banks and bankers of the District of Columbia with their customers:"—

Held, that the evidence was rightly excluded: *Thompson v. Riggs*, 5 Wall.

LICENSE.

Under Internal Revenue Acts—A Mode of Taxation only.—Licenses under the Act of June 30th 1864, "to provide internal revenue to support the government, &c." (13 Stat. at Large 223), and the amendatory acts, conveyed to the licensee no authority to carry on the licensed business within a state: *License Tax Cases*, 5 Wall.

The requirement of payment for such licenses is only a mode of imposing taxes on the licensed business, and the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of such taxes: *Id.*

The provisions of the Act of Congress requiring such licenses, and imposing penalties for not taking out and paying for them, are not contrary to the Constitution or to public policy: *Id.*

The provisions in the Act of July 13th 1866, "to reduce internal taxation, &c." (14 Stat. at Large 93), for the imposing of special taxes, in lieu of requiring payment for licenses, removes whatever ambiguity existed in the previous laws, and are in harmony with the Constitution and public policy: *Id.*

The recognition by the Acts of Congress of the power and right of the states to tax, control, or regulate any business carried on within their limits is entirely consistent with an intention on the part of Congress to tax such business for national purposes: *Id.*

A license from the Federal government, under the Internal Revenue Acts of Congress, is no bar to an indictment under a state law prohibiting the sale of intoxicating liquors. The *License Tax Cases*, *supra*, affirmed: *Pervear v. The Commonwealth*, 5 Wall.

A law of a state taxing or prohibiting a business already taxed by Congress, as *ex. gr.*, the keeping and sale of intoxicating liquors,—Congress having declared that its imposition of a tax should not be taken to abridge the power of the state to tax or prohibit the licensed business,—is not unconstitutional: *Id.*

LUNATIC.

Inquisition—Burden of Proof.—An inquisition finding that a party is a lunatic or habitual drunkard, is *primâ facie* evidence of incompe-

tency at any time covered by the finding, and the burden is upon the party setting up a contract of the lunatic or habitual drunkard to show that he was sane at its execution: *Noel v. Karper*, 53 Penna.

In such case it must be shown that the lunatic or habitual drunkard had memory and judgment enough to understand the character of the act, and the legal responsibility entailed thereby: *Id.*

The presumption in favor of sanity is changed by the fact that there was such inquisition: *Id.*

Proof of fixed habits of intemperance for two years would not, aside from such finding, shift the burden of proof so as to require the party setting up the contract to prove competency at the time of its execution: *Id.*

MARRIAGE AND DIVORCE.

Jurisdiction.—The Supreme Court has no inherent power to declare a marriage contract void, or to decree a limited or an absolute divorce. Whatever power it possesses is given by statute; and it can exercise no power, on the subject of divorce, except what is expressly specified in the statute: *Penguet v. Phelps*, 48 Barb.

The court has no jurisdiction to declare a marriage void on the ground that a decree for divorce was obtained against the defendant by her former husband for adultery; in which decree she was forbidden to marry again until her said husband should be dead; and that in disobedience of this provision she and the present plaintiff went to another state and were there married: *Id.*

NEGLIGENCE.

Death from Negligence—Damages.—A railroad company, which grants the use of its road to another company, is responsible for accidents caused to passengers which it itself carries, by the negligence of the trains of the other company thus running by its permission: *Railroad Co. v. Barron*, 5 Wall.

When a statute—giving a right of action to the executor of a person killed by such an act as would, if death had not ensued, entitle such person to maintain an action for damages—provides, that the amount recovered shall be for the exclusive benefit of the widow, and next of kin, in the proportion provided by law in the distribution of personal property left by persons dying intestate; and that “in every such action the jury may give damages as *they shall deem a fair and just compensation with reference to pecuniary injuries resulting from such death, &c.*, not exceeding, &c.”—it is not necessary to the recovery that the widow and kin should have had a legal claim on the deceased, if he had survived, for their support: *Id.*

Seemle, that statutes of this kind are enacted, as respects the measure of damages, upon the idea that as a general fact the personal assets of the deceased would take the direction given them by the law governing the case of intestates. Hence any damages given must, as a general thing, be so distributed, even though the party have left a will not so devoting his property: *Id.*

The damages in these cases must depend very much upon all the facts and circumstances of the particular case. And as when the suit is brought by the party himself, for injuries to himself, there can be no fixed measure of compensation for the pain and anguish of body and

mind, nor for the loss of time and care in business, or the permanent injury to health and body, so when it is brought by the representative for his death the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. In the latter and more difficult case, as in the former one, often difficult also, the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury, applied, as above stated, to all the facts and circumstances: *Id.*

NUISANCE.

Damage to an Inn by Noise and Jarring of Machinery.—In an action to recover damages to an inn, from a nuisance, by carrying on works and operating machinery in the neighborhood, which shook the building and prevented guests from sleeping, evidence is incompetent on the part of the plaintiff to show that frequently guests, on leaving the inn at night and seeking other lodgings, declared that they did so because they were prevented from sleeping by the jar. And evidence is incompetent on the part of the defendants to show that, in the opinion of witnesses who were familiar with the locality, and who had bought, sold, and let real estate in the vicinity, the effect of the stopping of the defendants' works would be to diminish materially the value of the plaintiff's premises for occupation, although the plaintiff has introduced evidence to show that operating the defendants' works has diminished the rentable value of his premises: *Wesson v. Washburn Iron Co.*, 13 Allen.

An action may be maintained to recover damages for a nuisance to a dwelling-house, caused by carrying on works and operating machinery in the vicinity, which fill the air with smoke and cinders, and render it offensive or injurious to health, and shake the building so as to injure it and render its occupation uncomfortable, although all persons owning estates in the vicinity have sustained similar injuries from the same cause. It is only when the nuisance complained of is an invasion of some common or public right that the remedy is confined to a public prosecution: *Id.*

PLEADING.

Negative Pleas.—The plea "covenants performed *absque hoc*, &c.," is a negative plea in part at least; the words "*absque hoc*" introducing a negation after an affirmative inducement: *Smith v. Frazier*, 53 Penna.

It contains an averment that the defendant has performed his covenants, and a denial that the plaintiff had performed his; throwing the burden of showing performance on the plaintiff, who is therefore entitled to the conclusion to the jury: *Id.*

RAILROAD COMPANIES.

Acts and Admissions of Agents.—An agent of a railroad corporation, having charge of a depot, and the freight therein, is the proper person to inquire of respecting lost baggage; and his answer is part of the evidence of the loss, and admissible as *res gestæ*: *Curtis v. The Avon, Genesee, &c., Railroad Co.*, 48 Barb.

So, in regard to an arrangement between a passenger and the baggage master, at a station, that the baggage of the former may remain at the depot, and that the latter will see to it, until it can be sent for: *Id.*

Evidence in Actions against.—In an action by a passenger, against a

railroad company, to recover for lost baggage, evidence to show that the passenger was lame and unable to take charge of his baggage, personally, is admissible, as tending to prove that he was guilty of no negligence in not calling for and taking charge of his baggage upon the arrival at his place of destination; and as furnishing a good reason for making an arrangement with the agents of the railroad company that it should remain in the custody of the company until called for: *Id.*

Liability for lost Baggage.—Where a passenger, on arriving at his destination, neglects to look after his baggage and negligently leaves it, without any arrangement that the carrier shall retain it for him, and it is lost while thus situated, without fault on the part of the carrier, the latter is not liable: *Id.*

But where there is no delivery of baggage carried upon a railroad, to the passenger, and no neglect to claim it or inquire for it, but on the contrary the company's agents agree to retain it until it can be sent for, the company's liability, as a common carrier, continues after the baggage is taken from the cars and until it is delivered or tendered to the owner: *Id.*

STREAM.

Use by Owner of Land.—The owner of land, through which a natural stream of water passes, has no right to use the water for such purposes as will corrupt it, to the material injury of the riparian owners below: *Merrifield v. Lombard*, 13 Allen.

Rights of Owner of Land.—The owner of land bordering upon a stream may lawfully dig a canal upon his own land which will prevent it from being flowed by the erection or raising of a dam below, if he does not thereby divert the water from its natural course; and the fact that the owner below has already begun to build or raise his dam is immaterial: *Storm v. Manchaug Co. and Others*, 13 Allen.

SURETY.

Negligence of Creditor.—To exempt a surety from liability by reason of the neglect and refusal of the creditor to collect the debt of the principal debtor while he was solvent, although requested to do so by the surety, it must be shown that the creditor was requested to enforce the collection of the debt *by due process of law*. Nothing short of that, in such a case, will exonerate the surety: *Singer v. Troutman*, 48 Barb.

Where the request was that the creditor should "push" the principal debtor, "and keep pushing him:" *Held*, that the words used had not the same legal significance as the words "prosecute or collect;" that to give those terms the same legal significance, it was necessary not only that the creditor should have understood them in that sense, but that the surety should have meant and intended that, also: *Id.*

The terms in which such a request are made are not material, but they should be unequivocal and clearly and plainly intended and understood as a request to collect by prosecution: *Id.*

TAXATION.

Exemption on account of Military Service.—The property of a married woman is not relieved from taxations for bounties, by the exemption

of her husband on account of military service: *Crawford v. Burrell Township*, 53 Penna.

The exemption of the soldier is a personal privilege, and does not exempt the wife of a living soldier: *Id.*

TELEGRAPH COMPANY.

Power to make Regulations—Message not repeated.—In this Commonwealth, telegraph companies may limit the measure of their liability to damages for errors in the transmission of messages, by reasonable rules and regulations, brought home to the knowledge of the parties interested therein: *Ellis v. American Telegraph Co.*, 13 Allen.

If a message is received by a telegraph company for transmission from one point to another in this Commonwealth, written upon a blank which contains, as a part of the terms and conditions upon which all messages are received by them for transmission, a statement that every important message should be repeated, by being sent back from the station at which it is to be received to the station from which it is originally sent, for which repetition half the usual price will be charged, and that they will not be responsible for any error in the transmission of any unrepeatable message beyond the amount paid for sending the same, unless a special agreement for insuring the same be made in writing, and if an error occurs in transmitting the same, and the same is not asked to be repeated, and the message as erroneously transmitted is written upon a blank containing the same terms and conditions above referred to, and in that form is delivered to the person to whom it is addressed, such person so receiving the same cannot maintain an action against the company to recover greater damages than the amount paid for sending the same, without some further proof of carelessness or negligence on their part than that resulting simply from the error: *Id.*

TENANTS IN COMMON.

Accounting between.—One tenant in common, although he have the exclusive possession of the common property, is not liable to account to the other tenants in common either for rent or for a share of the profits, unless there be an express agreement that he shall do so: *Wilcox, Administratrix, &c., v. Wilcox et al.*, 48 Barb.

Liability of Husband for Rent.—Where a married woman is a tenant in common with others, of property occupied by her and her husband, his occupation being that of his wife, no action will lie against him by the other tenants in common, for rent, without proof of an agreement to pay it: *Id.*

USURY.

Mode of Pleading.—Where usury is set up as a defence the usurious contract should be so pleaded that it may appear what rate or amount of interest was taken or secured, and on what sum, and for what time; and the answer should show a corrupt intent: *The National Bank of the Metropolis v. Orenth*, 48 Barb.

When these facts appear from the terms of the answer, nothing further is necessary to make it sufficiently definite: *Id.*

If the answer avers that the plaintiff discounted the drafts sued on

at an usurious rate of interest, contrary to the statute, and then specifies the amount of interest taken, this, though it may or may not be an insufficient averment of a corrupt intent, is not so palpably defective in this respect as to authorize a judgment for the plaintiff for frivolousness: *Id.*

VENDOR AND PURCHASER.

Agreement for Sale and Purchase.—An absolute contract for the sale of an interest in land, authorizing the purchaser to take immediate possession, the consideration to be paid on demand, vests in the purchaser the equitable interest in the land the moment it is executed and delivered: *McKechine et al. v. Sterling*, 48 Barb.

Such an agreement is not a covenant for the immediate possession, or a condition therefor, the breach of which will avoid the contract: *Id.*

Destruction of Building by Fire.—The destruction of the building on the premises by fire, after the making of such a contract, is no defence to an action for the purchase-money; the purchaser being the owner thereof, and having an insurable interest therein: *Id.*

WAY.

Obstruction of—License.—The plaintiff having recovered against the defendant for obstructing an alley by a wall, afterwards agreed that he might keep up the wall for \$30 per annum; the defendant having continued the obstruction after notice to remove it, there was no error in charging that the plaintiff should recover: *Gilmore v. Wilson*, 53 Penna.

The agreement was but a license to maintain the wall for a definite time, determinable at the end of any year, and no damages could be recovered whilst the rent ran: *Id.*

The obstruction was unlawful in the beginning, and the permission for continuance having expired, the parties stood as at first: *Id.*

LIST OF NEW LAW BOOKS RECEIVED BY THE PUBLISHERS OF THE AMERICAN LAW REGISTER.

BEITEL.—A Digest of Titles of Corporations chartered by the Legislature of Pennsylvania, between the years 1700 and 1866 inclusive. Giving the dates of Acts of Incorporation, with the several Supplements thereto, with a reference to the pages of the Pamphlet Laws where they may be found. By CALVIN G. BEITEL, of the Easton Bar. Philadelphia: John Campbell, 1867. Law Shp. \$6.

BOOK BUYER, THE.—A summary of American and Foreign Literature. Published monthly by C. Scribner & Co., New York, and sent to any address on receipt of 25 cts. for postage.

BOUVIER.—A Law Dictionary, adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union. By JOHN BOUVIER. 12th Ed. revised and greatly enlarged. 2 vols. Royal 8vo. Philadelphia: Geo. W. Childs, 1868. \$12.

THE
AMERICAN LAW REGISTER.

JANUARY, 1868.

PATENTING A PRINCIPLE.

THE opinions of professional men are far from being settled, apparently, upon all the questions involved in patenting a principle. Perhaps there are not many who suppose that having discovered such a principle entitles the discoverer to appropriate it under a patent, provided he has reduced it to practice. The current of decisions has been so uniform in recognising the title as belonging to the one who has first made a useful application of a law of nature, and upon that ground alone, that a person can hardly be found who believes the title to be strengthened in consequence of having brought the law to light. A much greater diversity of sentiment exists as to the extent of the right which the individual acquires in the principle so applied, and the form in which a patent should be expressed in order to protect the right. On the one hand it seems to be held that he is entitled to the exclusive use of the principle, when employed for the same purpose by whatever instrumentalities the purpose is effected; and that the patent should expressly claim, not only the instrumentalities adopted by the patentee, but also the use of the principle for the purpose however applied. Others believe that, having shown by what means the principle can be made to accomplish the object, the patent, although it covers only those means in express terms, yet confers an exclusive privilege in the employment of the principle to accomplish the object, let the means

resorted to be ever so different. On the other hand it is regarded by many as well settled, that he who has invented a method by which a property of matter can be, for the first time, rendered useful for a particular purpose, is entitled to a patent for the method, or process or mechanism which he has contrived, and that he can set up no claim to anything more, nor vindicate a right to anything more.

Several things have contributed to this discordance of sentiment. One of the most prominent is a misapprehension of the effect and bearing of some of the cases on the subject. It is not necessary to engage in an exhaustive discussion of all the reported decisions in which the question is involved ; but some examination of a few of the leading ones seems to be requisite in order to render it clear.

From the earliest date the established doctrine of the English courts has been that a principle cannot be patented. It has been pronounced from the bench times without number, has been uniformly assumed as the law, and has never once been questioned since *Hornblower v. Boulton* was determined. It appears to have been made the subject of consideration for the first time in two suits brought upon Watt's patent for his steam-engine. In one of them, *Boulton & Watt v. Bull*, 2 H. B. 463, and Dav. Pat. Cas. 162, the court were divided in their construction of the patent, and consequently no judgment was ever rendered. All were agreed in condemning the idea that a principle could be patented, and two of the judges interpreted the grant as embracing a monopoly of a principle, and held it to be void on that ground. The other two understood it to cover only the structure of the engine, and therefore maintained its validity. Lord Chief Justice EYRE uttered the following noticeable sentiments on the occasion : " Undoubtedly there can be no patent for a mere principle. But for a principle so far embodied and connected with corporal substances, as to be in a condition to act, and to produce effects in any art, trade, mystery or manual occupation, I think there may be a patent. Now this is, in my judgment, the thing for which the patent was granted ; and this is what the specification describes, though it miscalls it a principle. It is not that the patentee conceived an abstract notion that the consumption of steam in fire-engines may be lessened, but he has discovered a practical method of doing it ; and for that practical method of doing it he has

taken out a patent. Surely this is a very different thing from taking out a patent for a principle." The expression "a principle embodied and connected with corporal substances," &c., may have had some part in originating the idea that the principle itself is what may be patented. It may be doubted whether the distinction between a principle embodied in a material structure, and a machine embodying a principle, was in his lordship's mind at all. If it was, the latter part of the quotation shows that it was the machine he contemplated: he says it was "for that practical method of doing it he has taken out his patent."

Having failed to establish their title in that suit, the plaintiffs brought another, which was subsequently carried by writ of error to the Court of King's Bench, and is reported by the name of *Hornblower v. Boulton*, 8 T. R. 99. Judgment was given in their favor upon the sole ground that the patent was for a machine, and not for a principle, as may be seen from the following language of Lord KENYON, Chief Justice: "By comparing the patent and the manufacture together, it evidently appears that the patentee claims a monopoly for an engine, or a machine composed of material parts, which are to produce the effect described." "But having heard everything that can be said on the subject, I have no doubt in saying that this is a patent for a manufacture, which I understand to be something made by the hand of man." LAWRENCE, J., rested the same conclusion upon the language of the Act of Parliament, under which the patent had been extended; saying, "From this it is clear that the legislature understood that the patent was for an engine for some mechanical contrivance." The other judges concurred in these views, and, notwithstanding the strenuous efforts of the counsel to sustain the patent upon the ground that a principle could be patented, they emphatically condemned the position.

Passing over several cases, which will be adverted to in the following pages, the case of *Neilson v. Harford*, 1 W. P. C. 273, and 8 M. & W. 806, next demands attention. The action was brought upon the patent for using the hot-blast in smelting iron, and the like, and was considered at great length in the Court of Exchequer Chamber. The court were chiefly occupied with the objection, that the patent represented the form of the vessel in which the air is heated to be immaterial, and this the jury had found was not true, certainly in one sense. It was also urged

that the patent was for a principle; and respecting this Baron PARKE, who pronounced the opinion, made these observations: "Then taking the construction of this specification upon ourselves, as we are bound to do, it becomes necessary to examine what the nature of the invention is which the plaintiff has disclosed by this instrument. *It is very difficult to distinguish it from a patent for a principle, and this at first created in the minds of some of the court much difficulty*; but, after full consideration, we think the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. *We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to a furnace.* And his invention then consists in this, by interposing a receptacle for heated air between the blowing apparatus and the furnace" (W. P. C. 370, 371). It is difficult to see how they could have more emphatically denied that a principle can be patented. The inventor had brought to light a property of matter of immense value, and had rendered it practicable. If there was ever a case in which such a discovery should be protected it was this, and the court were evidently actuated by an earnest desire to secure to the discoverer his reward. Yet they found themselves compelled to put a forced interpretation upon his grant, and to construe it as covering the structure he employed, because they could not, with due regard to their legal convictions, allow him to monopolize the property of matter. They add this pregnant remark: "We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it." They give him no credit for having been the first to eliminate it, and make it known. They estimate his merit by the application which he had made of it, and by that alone.

The same patent came under consideration soon after in *The Househill Co. v. Neilson*, W. P. C. 673, a case which requires a more careful examination, perhaps, than any other on the subject, both on account of the erroneous significance which has been attached to it, and the influence it has exerted in misleading many of the profession. It was tried first by the Court of Sessions in Scotland, Lord Justice Clerk HOPE presiding, and then on appeal by the House of Lords. The defendants undertook to raise questions which involved the objection that the patent was

for an abstract principle, and therefore void. Lord HOPE thereupon (p. 677) expressed his conviction that they were not at liberty under the pleadings, or issues as settled, to go into that defence. On inspecting the issues (p. 674), it will be clearly seen that no such point was raised. Nevertheless, in order to enable the defendants to carry up the question, he concluded to entertain the objection, and treat it as if it were legitimately before him. Accordingly he proceeded to instruct the jury, in unqualified terms, that the plaintiff, having discovered the principle, and shown how it might be applied usefully, was entitled to a patent for the principle. All this, however, was on the erroneous hypothesis that the objection had been properly taken.

It has been said, however, that this ruling of Lord HOPE's was affirmed upon the hearing of the appeal before the House of Lords. It is true that all the exceptions taken by the defendants to his Lordship's instructions were overruled on that occasion, saving one, which has no bearing on the question under consideration. The reason is to be learned from a foot note to the report, on p. 711. From that it appears that, when the counsel for the appellants (the defendants below), approached this part of the case, the Law Lords expressed such a decided conviction that the objection to the patent on account of its being for a principle, could not be raised under the pleadings and issues, that the objection was abandoned. And in accordance with this we find Lord CAMPBELL interposing in the course of the argument, and asking the counsel for the appellants "what issue have you on this record to raise the question of the patent being for a principle?" And after some further conversation he told them "You might have pleaded that it was a patent for a principle, and not for any particular mode of applying a principle. There is no issue for the direction of the judge upon that point:" pp. 701, 702. And Lord LYNTHURST mentioned, in delivering his opinion, that he understood the counsel to abandon that defence (p. 711). The decision below was affirmed, nevertheless, because, since the defendants could not raise the question at all, they were not injured by an adverse ruling respecting it, and could not allege it as an error, so as to set aside the judgment. The whole authority of the case, therefore, rests upon the instructions given by Lord HOPE to the jury, hypothetically and upon a supposition that had no foundation, as he himself believed.

Among the American cases on this subject two are prominent: those of *Le Roy v. Tatham*, 14 How. 156; and *O'Reilly v. Morse*, 15 How. 62.

In the first of these the patentees described in their specification a property of lead, which had been discovered by them, viz.: that, if divided when just congealed, and then pressed together while still hot, the edges will unite. This they had reduced to practice in a machine for making lead pipe, and it was found to be a valuable improvement. Judge McLEAN, who gave the opinion of the majority of the court, interpreted the patent as embracing the machine only, and as they determined that to have been anticipated, they condemned the patent. The minority put a different construction upon the grant. They held that it appropriated the newly discovered property of lead, and that the plaintiff had a right to so appropriate it, and ought to recover. Lord HOPE's views were greatly relied upon, and it was evidently supposed that they had been sanctioned by the House of Lords. It should be observed, further, in order that the bearing of this case may be fully understood, that, in *O'Reilly v. Morse* (which was decided the next year), Chief Justice TANNEY said that it was held by the court in *Le Roy v. Tatham*, that the plaintiff "was not entitled to a patent for this newly discovered principle, or quality, in lead, and that such a discovery was not patentable:" p. 117. It would seem, therefore, that the doctrine of the minority on this point was not acquiesced in by their colleagues, though it was passed over in the opinion given for the majority.

The patent came under the consideration of the court again in the case of *Le Roy v. Tatham*, 22 How. 132, and was sustained in consequence of a new view which was taken of it. In delivering the opinion of the court, Judge McLEAN took occasion to declare, in emphatic terms, that Lord HOPE's doctrine was not law in this country.

In *O'Reilly v. Morse*, the principal question arose upon the eighth claim in the patentee's specification. It was expressed in these words, viz.: "The use of the motive power of the electric, or galvanic current, however developed, for making or printing intelligible characters, signs, or letters, at any distance." The patentee did not pretend to have been the first one who had discovered that the electric current would produce motion at a distance. But he did claim, and truly, to have contrived a mechan-

ism, or process, whereby it could be made to print characters at a distance. He set up a claim, therefore, to the exclusive right of doing this by any process or machinery whatever. This claim the court negatived in the most unequivocal terms, and Chief Justice TANEY, in delivering their judgment, used this language, which will bear repetition: "Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to, or subtraction from them, produce precisely the result he describes. And if this cannot be done by the means he describes, the patent is void; and if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy, known or unknown before his invention, or by machinery acting altogether on mechanical principles. In either case he must describe the manner or process as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end, without infringing the patent, if he uses means substantially different from those described:" p. 119. And he also declared that the doctrine of Lord HOPE is not law in this country.

After the elaborate discussion and full consideration which these cases underwent in the Supreme Court, it can hardly be required to examine at length those in which the subject has been touched upon in the Circuit Courts. What was said in substance respecting them by TANEY, C. J., in *O'Reilly v. Morse*, will answer the purpose. The earlier decisions are in uniform accordance with the ruling in that case, and the idea of patenting a principle is never mentioned but to be denounced. (See *Evans v. Eaton*, Pet. C. C. 341; *Stone v. Sprague*, 1 Story 272; *Wyeth v. Stone*, Id. 285; *Blanchard v. Sprague*, 2 Id. 166, 170; 3 Sumn. 536, 540; *American Pin Co. v. Oakville Pin Co.*, 3 Am. Law Reg. O. S. 137, and Law's Dig. 260; *Smith v. Downing*, Law's Dig. 593.) A change was undoubtedly produced by the proceedings upon Neilson's patent, and the instructions of Lord HOPE were in seve-

ral instances adopted as the law by the judges in their circuits. *Parker v. Hulme*, 7 West. Law J. 419, Law's Dig. 593, and *Foote v. Silsby*, 2 Blatchf. 265, may be mentioned among them. It is a grave mistake, however, to assert that the decision upon this question in the last case was affirmed in the Supreme Court. The question arose upon the first claim alone in the plaintiff's patent; and on the hearing in the Supreme Court it was expressly stated by the learned judge, NELSON, who pronounced the decision, that the first claim was found to have been anticipated, and was not before the court: *Silsby v. Foote*, 20 How. 378.

Since *O'Reilly v. Morse* was decided, the right to patent a principle has never received the slightest countenance from the bench, but, whenever it has been adverted to, it has been denied in unqualified terms. It was so in *Le Roy v. Tatham*, 22 How. 132. In *Wintermute v. Redington* (U. S. Cir. Ct. N. D. Ohio, 1856), a patent was tried which eminently deserved all the favor to which the discovery of a new and valuable law of physics could entitle it, it being for the well-known reaction waterwheel. Yet the learned judge, WILSON, who presided at the trial, used the following language respecting it: "If the defendant, in the use of a reaction waterwheel, whether on a vertical or horizontal shaft, whether single or in pairs, has run, or caused it to be run by the aid of the vertical motion of the water upon the wheel in its line of motion, he has violated the patent; *provided he has used, in so doing, any or all of the patentee's mechanical means for producing that vertical motion, or mechanical equivalents for all or any of them to produce it.*"

We may now recur to the cases which are usually referred to in discussing this branch of the law, and which have been passed over. It will be found, on examination, that they, every one of them, involved an invention consisting exclusively in the new application of some law of mechanics, or what is equivalent to such a law. And what were held to be infringements consisted in the employment of what were mere mechanical substitutes for the devices which the patentee had described in his specification. They were neither more or less than equivalents for those devices, at least they were so regarded by the court. It is true that the judges frequently speak of the principle of the patented structure, and vindicate the patentee's exclusive right to it. But the term principle is used by them in a qualified sense. As Judge STORY

said in *Barrett v. Hall*, "care should be taken to distinguish what is meant by a principle. In the minds of some men, a principle means an elementary truth or power," &c. "No one, however, in the least acquainted with law, would for a moment contend that a principle in this sense is the subject of patent." "The true legal meaning of the principle of a machine, with reference to the Patent Act, is the peculiar structure or constituent parts of such machine:" 1 Mass. 470. So it was said also by Judge McLEAN in *Brooks v. Jenkins*, "The word principle is not used here in its general signification, but as applied to the structure of a machine. It means the operative cause by which a certain effect is produced:" 3 McL. 451. Or, as Judge STORY defined it on another occasion, it means "the *modus operandi*, the peculiar manner or device of producing any given effect:" *Whittemore v. Cutter*, 1 Gall. 480. When, therefore, we find it announced from the bench that the patentee, having shown one way in which this principle of his machine is made to work effectively, is entitled to the use of all other ways in which it may be utilized for that purpose, we apprehend that nothing more is intended than that his patent shall not be evaded by what are only equivalents for the mechanisms he employed.

In *Jupe v. Pratt*, 1 W. P. C. 145, for instance, there can be no pretence that the plaintiff had found out any new property of matter, any law of physics, or even any new principle of mechanics. He had, at the most, made an ingenious and novel application of well-known mathematical truths. This enables us to understand the just import of the language used by Baron ALDERSON on that occasion, which has been so often quoted. He first denied explicitly that a patent can be taken out for a principle. He adds, however, "You may take out a patent for a principle, coupled with the mode of carrying that principle into effect, provided you have not only discovered the principle, but invented some mode of carrying it into effect. But then you must start with some mode of carrying it into effect; if you have done that, then you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as piracy of your original invention." Now, if the learned judge intended by principle any law of nature, then his remarks were entirely foreign to the case. The plaintiff had made no such discovery, and, if he had, his discovery of it would have

given him no property in what he discovered. But, if his Lordship is understood to be speaking of what has been sometimes called the *modus operandi* of the invention, he is intelligible and consistent, and in harmony with what has been advanced above. The patentee of such an invention must have originated the principle in that sense. And having originated it, and described one method of applying it, he is entitled to all other methods of applying it. For all other methods of applying such a principle can be nothing more or less than substituting some equivalent or other for the mechanical device or devices, which are embodied in the method he has described.

So of *Crossley v. Beverley*, 1 W. P. C. 106, 3 C. & P. 513. The operation of the machine, for which the plaintiff had a patent, depended upon a well-known law of hydrostatics, the tendency of water to rise to the same level, wherever different bodies of it are in free communication. A great deal was said about the principle of the machine, the experts testifying that after the principle was once discovered, there were a hundred ways of reducing it to practice. Now they could not be speaking of the law of hydrostatics, which has been known from time immemorial. They evidently meant the *modus operandi*, the principle of mechanism by which that law was made to contribute to the purpose of the machine. The defendant's machine was wholly unlike the plaintiff's in appearance, and even in construction. But it was shown to operate upon the same principle, and so was held to be an infringement. Not because he availed himself of the same law of hydrostatics—everybody might make use of that. But he employed the same mechanical principle of operation. In other words, his devices were mere mechanical equivalents for those which were described in the plaintiff's patent.

Again, in *Walton v. Potter*, 1 W. P. C. 585, 3 M. & G. 411, 3 Scott N. R. 91, the patentee had made no discovery of any law of physics. He had merely made an ingenious application of the well-known qualities of india-rubber, in order to hold the teeth of wool-cards in a suitable position, yet have them flexible. He used for this purpose a sheet of the gum between two layers of cloth. The defendant used cloth enveloped in the gum, by having been dipped in a solution of it and dried, and thus effected the same object: and he was held to have infringed the patent. Why? Because he used india-rubber? No; but his fabric ope-

rated on the same principle; that is, the same principle of mechanics; and was a mere substitute for that of the plaintiffs.

We have seen that the plaintiffs' patent in *Neilson v. Harford*, was construed to cover the process of heating the air in a vessel placed between the blowing apparatus and the furnace. The defendant used a vessel in that position for the same purpose; but the construction of it was entirely different from that of the plaintiffs. It was held, nevertheless, to be an infringement. It performed the same functions, more effectually it is true, but still the same. In a mechanical point of view it operated on the same principle, and was its counterpart.

It is unnecessary to go through all the cases in the English books to which this explanation applies. One, which was determined by our own Supreme Court, deserves to be noticed here, especially because it was considered at the same term with *O'Reilly v. Morse*, and both must have been together in the minds of the judges—that of *Winans v. Dennacad*, 15 How. 330. The plaintiff's invention consisted in constructing coal-cars in the form of the frustum of a cone. The defendant's cars were octagonal instead of circular, but otherwise resembled the plaintiff's. One of the judges inclined to the opinion that the plaintiff was, by the terms of his patent, limited to the precise form he had described, and could have no remedy against others who used a different one. It was shown that there was no practical difference between the two; but either would derive especial strength from the mechanical law involved. And, though the plaintiff's claim was, in express terms, to the frustum of a cone; though he did not pretend to claim the mechanical law thus applied, the defendant was held to have violated his patent. This could not be on the ground that the principle of mechanics was patented. It must have been on the ground that the form adopted by the defendants was a mere equivalent for that of the plaintiff.

It may be said that what have been designated as mechanical laws in the preceding pages, are in truth laws of nature, physical just as much as the properties of matter, and that the two classes run into each other, so that no distinction can be made between them. It is not necessary to insist that there may be in theory. In practice, there is a radical difference which fully justifies their being considered as belonging to two classes. In the case of inventions founded on what have been termed mechanical principles, the patentee obtains full protection in the exclusive enjoy-

ment of the 'principle by being allowed an action against every one who uses an equivalent for his device. No machine can be constructed on the principle of his which does not embrace such equivalents. It may not be so where the novelty of the invention consists in some property of matter first brought to light by the patentee. Neilson's patent covered the use of a vessel for heating air placed between the blower and the furnace—not the introduction of heated air into the furnace, which was truly his discovery. If any one could have contrived to heat the air sufficiently before it entered the blower, he might have availed himself of Neilson's discovery with impunity. The difficulty of doing this constituted the whole strength of his patent. Anybody might have availed himself of the quality of lead discovered by the Tatham's, if he could have got up a machine of a different construction. It is very possible that the courts may give a larger range to the doctrine of equivalents, in order to secure to the discoverer of a new physical property an adequate reward for his ingenuity. Thus far, it is only as the defendant has been found to have employed mechanical equivalents for the construction specified by the patentee, that he has been held guilty of infringement, or the patentee has obtained protection.

There are a few other cases upon this subject which are not open to the explanation given to those heretofore mentioned, and which may be thought to require a passing notice.

The plaintiff in *Forsyth v. Riviere*, 1 W. P. C. 97, after describing in his specification the explosive compounds employed by him in igniting the charge in fire-arms, added: "I do not lay claim to the invention of any of the said compounds," &c., "my invention in regard thereto being confined to the use and application thereof to the purposes of artillery and fire-arms as aforesaid. . . And the manner of priming and exploding which I use is," &c., proceeding to describe it. There was no specification of claim. It is manifest that this patent was for the method he employed. It is true that the reporter says the defendant's lock was constructed differently; but he does not furnish the slightest intimation in what respect it varied. The note of the case is very short and unsatisfactory. The report, bearing the same title in Chit. Pr. C. 182, is upon another point entirely. But from the statement of the counsel in *Minter v. Wells*, W. P. C. 128, we learn that all the difference between the locks was this: in the

patentee's the hammer struck the pan containing the composition, and in the defendant's the pan struck the hammer.

No one can read the patent of the plaintiff in *Hall v. Boot*, 1 W. P. C. 100, without perceiving that he laid claim to his machinery when used in connection with gas flame. There was no positive evidence what machinery the defendants used, it is true; but this does not warrant the inference that the court recognised the plaintiff's title to the exclusive use of gas flame with any machinery for the same purpose. There was circumstantial proof of the strongest kind that the defendants' was borrowed from the plaintiff's, and was identical with it.

The claim set up in *Booth v. Kennard*, 1 Hurls. & N. 527, was for "making gas direct from seeds and matters herein named for practical illumination, or other useful purposes, instead of making it from oils, resins, or gums previously extracted from such substances." Upon the trial of the case, POLLOCK, C. B., held this claim to be too broad, and directed a verdict for the defendant. The verdict was set aside in the Court of Exchequer Chamber; and from the report it would certainly seem as if the court considered the patent valid. But when the cause came on for trial again before Chief Baron POLLOCK, he said that the court had decided nothing more than this: that the invention "was one which, if new, might be patented if properly specified." He added, "we are also of opinion that the claim is too large, and that such claim cannot be supported." There was a verdict for the defendant again. But as there was also strong evidence upon that trial that the invention was not new, the plaintiff probably deemed it unsafe to proceed any further, after moving that a verdict should be entered up for him, and being denied. Little or no reliance is manifestly to be placed on the report of the decision in the Exchequer Chamber, after the explanation given by Chief Baron POLLOCK.

The plaintiff in *Seed v. Higgins*, 8 Ell. & Bl. 755, 771, and 6 Jur. N. S. 1264, had originally taken out a patent for the application of the law or principle of centrifugal force to the particular or special purpose above set forth;" i. e. to fliers used for preparing, slubbing, or roving cotton, &c., so as to produce a hard and evenly compressed bobbin. He afterwards discovered that centrifugal force had been employed already for the same purpose, though by different means; and he therefore filed a

disclaimer, by which he limited himself to the mechanism he had described in his specification. Upon this a question arose whether his patent did not, when thus amended, appropriate a different invention from anything embraced in his original specification, and was not therefore void. The case was very fully discussed in several courts, but was finally decided against the plaintiff upon the ground that the defendant's machine was no infringement of the patent. In the course of delivering their opinions it was incidentally mentioned by one or more of the judges, that the defendant's machine came within the purview of the patent as originally framed. But there was no opinion expressed throughout as to the validity of the original patent, nor any allusion made to the subject. If it may be inferred from the silence observed respecting it that the validity of the instrument was admitted, there is some propriety in referring to the case when examining this doctrine. It will probably be regarded by most as of no weight whatever.

The court interpreted the second claim made by the plaintiff, in *Bovill v. Keyworth*, 7 Ell. & Bl. 724, to be for "exhausting the air from the cases of the millstones, combined with the application of a blast to the grinding surfaces." Upon this Lord CAMPBELL, who presided, remarked as follows, viz.: "Still if the specification does not point out the mode by which this part of the process (No. 2) is to be conducted, so as to accomplish the object in view, it would be a statement of a principle, and the patent would be invalid." He held it to be sufficient, however. And it may well be doubted whether it was fairly open to the objection that it would have been for a principle without a description of the process, though such a description was no doubt essential. The case belongs to a class which has been often supposed to involve the legality of patenting a principle, but really has little to do with it. A blast and an exhaust are two mechanical forces as well known as a stream of water or as steam. Every artisan skilled in the business is perfectly familiar with them, and knows how to produce them. The invention in this instance consisted in combining the two so as to produce a particular effect. After describing how this might be done, the specification defines the invention as consisting in the combination of these two forces, each applied to a particular and well-known mechanism. In all this we see nothing like patenting a

principle, and apprehend there was no foundation for the remark of his Lordship. He may have had an idea that the patent would have been defective in not specifying some visible structure as the invention; but that is very different from patenting a principle. The case has little or no bearing on that subject.

From this discussion and examination of the cases the following conclusions are legitimately drawn:—

1. Every discoverer of a new and useful application of any law of nature, any quality of matter, or any mathematical principle, is entitled to a patent for it.

2. It is not necessary to entitle him to a patent, that he should have been the first to search out and make known the law, quality, or principle which he has thus applied. And his having been the first to bring it to light adds nothing to his claims.

3. He will be protected in his right by holding as infringements of his patent all mechanical equivalents for the devices for carrying his discovery into effect, which he has described and designated in his specification as his invention. And he can have no other protection, even though the principle he has applied was first discovered by him.

4. No one can legally specify as his invention, and take out a patent for the exclusive use of any such law, quality, or principle when employed for the same purpose as his. No instance can be found where any such patent has been sustained, and they have been repeatedly pronounced invalid by the courts.

S. H. H.

RECENT AMERICAN DECISIONS.

Supreme Court of New York.

HUNTINGTON v. OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY.¹

Where a person employed for a certain term at a fixed salary payable monthly is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due; and the first judgment will not be a bar to another action for salary subsequently coming due.

THIS was an action brought to recover for constructive services from the 1st of July to the 1st of September 1866.

¹ We are indebted for this case to Awerill & Kellogg, Esqs., the plaintiff's counsel.—EDS. AM. LAW REG.

The plaintiff proved a contract for services as station agent for ten months, from March 1st 1866, at \$100 per month, payable monthly; that on the 7th day of June he was discharged without cause; that he had at all times held himself ready to serve under said contract, and frequently tendered his services in pursuance thereof, and that during the time he had no other employment.

The defendant proved that on the 21st day of July 1866 the plaintiff commenced an action against the defendant in a justices' court, to recover services under said contract for the month of *June*; that on the trial the plaintiff proved the contract, his discharge, readiness and offer to serve during said month, and defendant's refusal to employ him, and recovered a judgment for said month's wages.

At the close of the evidence the defendant moved for a nonsuit, on the ground that said judgment in the justices court was a *bar* to this action. By direction of the court, a verdict was entered for the plaintiff for \$150, and the case reserved for further consideration.

Averill & Kellogg, for plaintiff.

Brown & Hasbrouck, for defendant.

The opinion of the court was delivered by

JAMES, J.—The single question is, was the judgment rendered before the justice for the wages of the month of June under the contract, a bar to a further recovery for services tendered but not accepted. "It is settled law that only one action can be maintained for the breach of an entire contract, and that a judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding; but the difficulty is, to determine in what cases the contract is entire, and the question becomes much complicated in the consideration of agreements to do specific acts at various prospective periods."

Originally, *debt* was the only action to recover a sum certain; and it was held no action would lie to recover instalments on a bond, *in debt*, until all the instalments were due. But when the action of *assumpsit* was adopted, the rule was modified, and the plaintiff was allowed to proceed on the first default, although a judgment in such action was still held a full satisfaction. But

this rule was further modified by a decision in the King's Bench in *Cook v. Wharwood*, 2 Saund. 387, in which it was held—"that when in an action on an award to pay several sums at several times, an action might be brought for each sum when due, that the plaintiff should recover damages accordingly, and have a new action as the other sums became due."

In Massachusetts (*Badger v. Titcomb*, 15 Pick. 437), it was held that a contract to do several things at several times, is *divisible* in its nature, and that an action of *assumpsit* would lie for every default. A note at 224 marginal paging, 3d ed., of Sedgwick on Damages, purporting to be from the case of *Fowler v. Armour*, 24 Alabama 194, says:—"If one contract to serve another for one year at a stipulated sum, payable monthly, and is discharged without any fault on his part, before the expiration of the year, he may treat the contract as still subsisting, and sue in *assumpsit* for wages due according to its terms; or he may consider it rescinded, and sue for unliquidated damages for its breach. If he sue on the contract he can only recover the wages due by its terms before the institution of the suit; if he sue for damages for breach of contract, he is entitled to recover the actual damages sustained up to the trial."

In *Thompson v. Wood*, 1 Hilton 93, the plaintiff claimed to recover two months' salary on a hiring by the year, he having been discharged without cause, and being ready and willing to perform; the defendant set up a previous action by plaintiff against defendant, to recover a balance due for services actually rendered, and breach of contract; the latter claim was withdrawn on the trial, and judgment rendered only for the balance due at the time of plaintiff's discharge; and it was held that such judgment was no bar. INGRAHAM, Judge, said: "When an agreement of this kind is broken, the person employed has his election, either to sue for his wages as they become due from time to time, or to bring one action for damages for the breach of the contract. If such action is brought before the term of hiring has expired, and the party recover damages for a breach of contract, such recovery estops him from bringing another action; but if his action is merely to recover the wages due at the time of bringing the action, he is not thereby deprived of his right either to recover wages subsequently becoming payable, or an action for damages for the subsequent breach of the agreement in not employing

plaintiff according to the contract." According to the dictum of this case, the former recovery by the plaintiff here, is no bar to the present action; but the point was not necessary to a disposition of the case, the former recovery having been for services actually rendered before breach.

The defendant cited and relied upon *Colburn v. Woodworth*, 31 Barb. 381. The facts there were much like those here, except in the first action the plaintiff in his complaint, in addition to a quarter's wages, claimed damages for a breach of the contract and issue was joined thereon, and a trial had on such pleadings; but the recovery was only for the quarter's wages, no other quarter being due when said action was commenced. The second action was for the second quarter's wages, and the court held the first action a bar, on the ground that in that action the plaintiff had counted for a breach, and that no other action could be maintained on the contract after that.

The real question raised in the present case, is, whether the monthly payments, by the terms of the contract, were several and distinct causes of action, arising as they became due, or whether they were single and entire.

In *Secor v. Sturgis*, 16 N. Y. 548, Justice STRONG lays down this rule: "The true distinctions between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Each contract, express or implied, affords one and only one cause of action. A contract containing several stipulations to be performed at different times is no exception, although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action being the stipulation, which is in the nature of a several contract."

What then was the contract in this case? It was a hiring at \$100 per month. It was therefore a contract containing several stipulations—each stipulation giving a right of action on its breach. There is no doubt the plaintiff could have maintained a separate action for each instalment as it became due, had he not been discharged, but continued to serve. Having been discharged *without cause*, his rights were not lessened; he was not bound to treat the contract as at an end. He *could* have done so, and

brought his action for damages for the breach; or he could have waited for the expiration of the whole time, and brought his action for all the monthly instalments—but he was not bound to do either. *He had the right to treat the contract as still subsisting, and could maintain an action for each instalment as it fell due.* I therefore hold, that the action before the justice was no bar to this, and direct judgment for plaintiff on the verdict.

It is well settled law that an entire contract will support but one action, and a judgment for part only of what the plaintiff might have recovered will be a bar to a second action for the residue. But where the agreement embraces a number of distinct subjects which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed: WASHINGTON, J., in *Perkins v. Hart*, 11 Wheaton 251; and each default in such case will support an action of *assumpsit*; for although the agreement is one, the performance is several: *Badger v. Titcomb*, 15 Pick. 409; *Lord v. Belknap*, 1 Cush. 279. Thus *assumpsit* lies for interest due on a promissory note by which interest is payable annually, although the note is not yet due: *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 3 Id. 221. And in a recent case in Massachusetts it was held that judgment for the interest on such a note was not a bar to a subsequent action for the principal, although it was due when the former action was commenced: *Andover Savings' Bank v. Adams*, 1 Allen 28. And in the same state, where the doctrine of the divisibility of contracts has been rather liberally applied, it was held that an acceptance of an order to pay \$200 out of the first money of the drawer received by the drawee out of certain claims, binds the acceptor to pay on request from time to time as the money is received, and a judgment recovered against him for part of the sum on his

refusal to pay, is not a bar to another action for a further sum subsequently received by him: *Perry v. Harrington*, 2 Metc. 368.

So where a contractor for grading a railroad contracted for monthly estimates by defendants' agent of the quantity and value of the work done during the month, four-fifths of which value were to be paid immediately. This was considered as a distinct stipulation for each month's work, and as forming the matter of a separate agreement: *Rodemer v. Hazlehurst*, 9 Gill 289.

And in an action of covenant for instalments of money, a former recovery on the same instrument was held not to be a bar where breaches for the instalments now demanded were not specifically assigned in the former suit, and evidence was considered admissible to show that the instalments now sued for had not fallen due and were not included in the former recovery: *Sterner v. Gower*, 3 W. & S. 136. See also *Logan v. Caffrey*, 6 Casey 200.

And, generally, it may be said that where there is part performance and by the terms of the contract payment may be demanded for that part, an action lies immediately: *Sickels v. Pattison*, 14 Wendell 257.

The decision in the principal case, therefore, that where a person is employed for a definite term at a certain salary for the term payable at shorter periods, the portions due at each period may be at once sued for, seems to be well founded in principle and supported by

authority. Where, as in the principal case, the employee has been wrongfully discharged during the period for which he was hired, the action is brought on the principle of *constructive service*, a doctrine somewhat peculiar to actions by servants and employees: 2 Smith's Lead. Cases 39. Thus, where a school teacher was employed at a salary of \$1200, payable in two payments of \$600 each, at the end of each session of five months, and was discharged in three months, a judgment at the end of the first session was held not to bar a second suit for the other payment at the end of the second session: *Armfield v. Nash*, 31 Miss. 361. See also *Thompson v. Wood*, 1 Hilton 93; *Colburn v. Woodworth*, 31 Barbour 381; *Fowler v. Armour*, 24 Ala. 199; *Gordon v. Brewster*, 7 Wisc. 355; *Booge v. Pacific Railroad Co.*, 33 Mo. 212.

The doctrine of constructive service, however, does not permit an employee who has been wrongfully discharged to remain wilfully idle during the period for which he had been engaged. A party injured by a breach of contract is entitled only to such damages as will indemnify him for his *actual loss*, and if he has it in his power to take measures by which his loss will be less aggravated, this will be expected of him. See *Miller v. Mariners' Church*, 7 Greenleaf 55, an early and leading case, in which the Supreme Court of Maine laid down this rule with great force. In the case of a servant or other employee, discharged, it is said that "idleness is in itself a breach of moral obligation. But if he continues idle for the purpose of charging another, he superadds a fraud which the law had rather punish than countenance." *Cowman, J.*, in *Shannon v. Comstock*, 21 Wendell 462. And see

also *Heckscher v. McCrea*, 24 Id. 304; *Wilson v. Martin*, 1 Denio 605; *Taylor v. Read*, 4 Paige 572; *Costigan v. Mohawk, &c., Railroad Co.*, 2 Denio 616; *Heim v. Wolf*, 1 E. D. Smith 70; *Bradley v. Denton*, 3 Wisc. 557.

As a result it may be said that where an employee for a fixed period at a salary for the period, payable at intervals, is wrongfully discharged, he may pursue any one of four courses:—

1. He may sue at once for breach of contract, in which case he can only recover his damages up to the time of bringing suit, and judgment will be a bar to any further action: *Colburn v. Woodworth*, 31 Barb. 381; *Booge v. Pacific Railroad Co.*, 33 Mo. 212.

2. He may wait till the end of the contract period and then sue for the breach. *Prima facie* he will be entitled to his full wages or salary for the whole period, but defendant, to reduce damages, may show what he has earned or might reasonably have earned from his discharge to the end of the contract period: *Thompson v. Wood*, 1 Hilton 93; *Taylor v. Read*, 4 Paige 572; *Costigan v. Mohawk, &c., Railroad Co.*, 2 Denio 616; *Gordon v. Brewster*, 7 Wis. 355.

3. He may, as in the principal case, treat the contract as existing and sue at each period of payment for the salary then due, subject, as in the preceding case, to a reduction by the amount of what he has earned or might have earned in the mean time by other employment.

4. He may treat the contract as rescinded and sue immediately on a *quantum meruit* for the services performed. But in this case he can recover only for the time he *actually* served: 2 Smith's Lead. Cases 39; *Note to Cutter v. Powell*.

J. T. M.

In the Circuit Court of the United States for the District of Iowa. October Term 1867.

Present, Judges MILLER and LOVE.

R. C. GRAY v. THE CLINTON BRIDGE AND OTHERS.

I. The Act of Congress of February 27th 1867 (16 U. S. Stat. 412), declaring a bridge erected by a railroad company across the Mississippi river at the city of Clinton in the state of Iowa "a lawful structure and a post-route," is constitutional and valid; and under it the Circuit Court of the United States will dismiss a bill to procure the abatement of the bridge as a nuisance, based on the ground that it presents a serious obstruction to the navigation of the river, although the suit for this purpose was pending at the time the Act of Congress was passed.

II. It was objected to this act:—

1. That it violates certain treaty obligations of the United States;
 2. That Congress has no power over bridges across the navigable streams of the United States;
 3. That the Act was special legislation and invaded the province of the courts.
- These objections severally considered and held not tenable.

III. The power of Congress to regulate commerce extends to commerce on land, carried on by railroads which are parts of lines of inter-state communication as well as to commerce carried on by vessels: and such railroads may be regulated by Congress as well as steamboats: Per MILLER, J.

IV. The commercial clause of the Constitution expounded by MILLER, J., in reference to railways and boats as instruments of commerce.

Grant and T. D. Lincoln, for complainants.

Howe, for defendants.

The opinion of the court was delivered by

MILLER, J.—This is a bill in chancery, the purpose of which is to procure the abatement of the bridge as a nuisance, on the ground that it presents a serious obstruction to the navigation of the Mississippi river. The pleadings are at issue, the depositions all taken, and the case set down for hearing.

The defendants now present a motion to dismiss the bill for want of jurisdiction. This motion is founded on the Act of Congress of February 27th 1867 (16 U. S. Statutes 412), which, it is claimed, takes away the jurisdiction of the court to proceed further in this case.

The complainant, on the other hand, maintains that in the true construction of the act it was not intended that it should dispose of the present suit; and that, if such is its true construction,

then it is unconstitutional. It is said that because the third section provides for litigation about the bridge after the passage of the act, and declares the circuit courts of the United States should have jurisdiction in such cases, it could not have been the intention of Congress to conclude the question raised by the bill in the present suit. But the second section of the act makes certain regulations concerning the use of the draw in the bridge, and contemplates that suits may grow out of a neglect or violation of those rules. It is to this litigation that the third section seems most naturally to refer. At all events, it is to litigation arising after the passage of the act to which alone that section by its own terms can apply.

The first section of that act, after describing a bridge already erected across the Mississippi river at Clinton, declares that "it shall be a lawful structure, and shall be recognised and known as a post route." It cannot be doubted that Congress was aware of the existence of the bridge, and that it had been complained of as an unauthorized and illegal obstruction to navigation. Nor can I see any reason to doubt that by this act Congress intended to remove the objection of its illegality and want of authorization so far as it had power to do so.

The declaration that it shall be a *lawful structure* admits of no other interpretation. The language is almost the same as that used by the same body in reference to the Wheeling bridge, where such was held to be its intent by the Supreme Court: *State of Pennsylvania v. Wheeling Bridge*, 18 How. 421.

It is not necessary to determine whether Congress had an intentional reference to this suit, which was pending when the act was passed, or whether it was aware that there was such a suit.

If it had the power to make the bridge lawful, which before was unlawful, it has done so in this case, and the court must be governed by the law as it exists when it is called upon to act.

The objections here taken to the constitutionality of that act are these :

1. That it is in violation of certain treaties between the United States and foreign nations, which declare in effect that the navigation of the Mississippi river shall remain free and unobstructed for ever.

2. That no power exists in Congress to authorize or regulate bridges over the navigable streams of the United States.

3. That such special legislation, while a suit is pending in the courts about the same matter, is an invasion of the rights of the judicial department of the government as secured by the Constitution.

1. In reference to the first of these objections, we need not inquire whether those treaties were designed to affect such cases as the one before us or not; for we are of opinion that whatever obligation they may have imposed upon our government, the courts possess no power to declare a statute passed by Congress and approved by the President, to be void because it may violate such obligations.

Those are international questions, to be settled between the foreign nations interested in the treaties and the political departments of our government. When those departments declare a treaty abrogated, annulled, or modified, it is not for the judicial branch of the government to set it up and assert its continual obligation. If the court could do this, it could annul declarations of war, suspend the levy of armies, and become a great international arbiter, instead of a court of justice for the administration of the laws of the United States.

2. The second of these objections involves the consideration of the commercial clause, as it is appropriately called, of the Constitution.

If the determination of the circumstances under which a bridge may be built over a navigable stream, or the prescribing general rules on that subject, is a regulation of commerce, either with foreign nations or among the states, then it falls within the powers conferred on Congress by that clause.

It would be sufficient in this court to say that we are concluded on this question by the decision of the Supreme Court in that branch of the Wheeling Bridge Case, already referred to, in 18 Howard, which expressly holds that the power to declare such a bridge a lawful structure is included within the clause of the Constitution above cited. That case was, however, decided by a court nearly equally divided, and its authority has been much questioned.

I think, however, that the proposition is well founded in principle. The power to regulate commerce is one of the most useful of all those confided to federal government, and its exercise has done as much to create and to foster that community of interest which constitutes the strongest bond of nationality, as the

exercise of any other power belonging to the General Government. The want of this power was one of the strongest necessities which led to the formation of the Constitution. The clause has always received at the hands of the courts and of Congress a construction tending liberally to promote its beneficent object.

The power to regulate commerce is a power to regulate the instruments of commerce. In the case of *Coolley v. The Board of Wardens*, 12 How. 316, the court says that "the power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used." Navigation is here spoken of as one of the subjects of legislation included within the power to regulate commerce. In this view of the subject, Congress has passed statutes regulating steamboats, their construction, equipment, officers and crews, prescribing qualifications of pilots and engineers, limiting the number of passengers they may carry, and laying down the signals they shall use in passing each other, and, in short, has prescribed a minute code for building and navigating those vessels. The right to do this depends wholly upon the power vested in Congress to regulate commerce, and has never been disputed.

Navigation, however, is only one of the elements of commerce. It is an element of commerce, because it affords the means of transporting passengers and merchandise, the interchange of which is commerce itself. Any other mode of effecting this would be as much an element of commerce as navigation. When this transportation or interchange of commodities is carried on by land, it is commerce as well as when carried on by water; and the power of Congress to regulate it, is as ample in the one case as in the other. The "commerce among the states" spoken of in the Constitution must, at the time that instrument was adopted, have been mainly of this character, for the steamboat, which has created our great internal commerce on the rivers, was then unknown.

Another means of transportation, equal in importance to the steamboat, has also come into existence since the Constitution was adopted, a means by which merchandise is transported across states and kingdoms in the same vehicle in which it started. The railroad now shares with the steamboat the monopoly of the carrying trade. The one has with great benefit been subjected to

the control of salutary congressional legislation, because it is an instrument of commerce. Is there any reason why the other should not? However this question may be answered in regard to that commerce which is conducted wholly within the limits of a state, and is therefore neither foreign commerce, nor commerce among the states, it seems to me that when these roads become parts of great highways of our Union, transporting a commerce which embraces many states, and destined, as some of these roads are, to become the channels through which the nations of Europe and Asia shall interchange their commodities, there can be no reason to doubt that to regulate them is to regulate commerce, both with foreign nations and among the states; and that to refuse to do this, is a refusal to discharge one of the most important duties of the Federal Government. As already intimated, the shackles with which the different states fettered commerce in their selfish efforts to benefit themselves at the expense of their confederates, was one of the main causes which led to the formation of our present Constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the Federal Government, has justified the wisdom of our fathers. But are we to remit the most valuable part of that commerce again to the control of the states, and to all the consequent vexations and burdens which the states may impose through whose territories it must be carried on? And must all this be permitted because the carrying is done by a method not thought of when the Constitution was framed?

For myself, I must say that I have no doubt of the right of Congress to prescribe all needful and proper regulations for the conduct of this immense traffic over any railroad which has voluntarily become part of one of those lines of inter-state communication, or to authorize the creation of such roads, when the purposes of inter-state transportation of persons and property justify or require it.

The bridge which we are now considering constitutes a part of an uninterrupted iron track from the Atlantic sea-board to the Missouri river, over which many thousand persons and millions of dollars worth of merchandise are carried every year. Within two or three years, it is confidently believed, this track will be without break from the Atlantic to the Pacific Ocean, and will carry the commerce of continents. Can it be seriously doubted

that in reference to this commerce, the magnitude of which we can hardly conceive, Congress can prescribe the place where the bridge shall be built over which it crosses the Mississippi river, and shall make such regulations concerning its character and its use as shall be best for the commerce of the river as well as the road? The commerce of the river and the commerce across the river, are both commerce among the states, and may be regulated by Congress, and should be regulated by that body when any regulation is necessary.

3. Whatever might be my individual opinion as a member of the Supreme Court, in the proposition that the statute under consideration is an invasion of the judicial powers of this court, I am, while sitting here, bound by the decision in the Wheeling Bridge Case, already referred to, where this question was raised and decided.

The Act of February 27th 1867, then, in our opinion, must finally dispose of this case. But it does so by furnishing a rule of law on which it must be decided, and not by depriving the court of jurisdiction. When reached for hearing, the bill must be dismissed on the merits, and not for want of jurisdiction. The present motion, for this and other reasons, cannot prevail.

But we have given the views of the court on the effect of the statute in the case, because counsel have argued it fully, and because the case being set down for hearing, counsel may possibly arrange that a decree should be entered in conformity with this opinion, without further hearing.

A decree was accordingly entered dismissing the bill, but at the cost of the defendants.

In the principles involved the foregoing case is one of great magnitude. The exposition of the commercial clause of the Constitution is one which cannot fail to attract very general professional, legislative, and public attention.

Until quite recently it seems very generally to have been taken for granted that private railways, though carrying on an immense traffic between different states, and though constructed to form between different portions of the Union unbroken lines of communication, were

exempt from congressional regulation or control.

The necessity for some common, central legislative power has been most seriously felt. Many of the evils to be remedied growing out of the rivalries and the selfishness of these corporations, have proved to be beyond any effective state control.

We rejoice to hear so careful and able a jurist as Mr. Justice MILLER, of the Supreme Court of the United States, declare that he "has no doubt of the

right of Congress to prescribe all needful and proper regulations for the conduct of the traffic carried on over any railroad which voluntarily becomes part of a line of inter-state communication ; or to authorize the creation of such roads when the purposes of inter-state transportation of persons and property justify or require it."

As illustrative of the necessity of national or congressional supervision over railways we quote from an interesting and valuable article on the subject of "Legislative control over railway charters," published in the April No. 1867, of the American Law Review.

The authors say: "In the state of Massachusetts it is maintained that great difficulty has arisen from the management of the roads connecting the city of Boston with Albany and the West. The discussion has brought to light many facts tending conclusively to show that these roads have for years been managed with little regard to the growing needs of the community. The charges so substantiated involve some of the most serious that can well be brought against a railroad corporation, without amounting to *misuser*. They can be grouped under three great heads ; namely,

1. Quarrels among corporations, causing great public detriment.
2. Unnecessarily excessive rates of fare and freight.
3. Insufficient accommodation for the public requirements."

Under the last head it even appears that the great channel of intercourse between the second commercial city of the Union and the West, after thirty years of successful operation, has neither a double track or a grain elevator: *Id.* pp. 473, 474.

And in connection with this subject we call particular attention to an article published in a recent number of this Journal (*Am. Law Reg.* February 1867), upon state and national legislation, so

far as that article relates to railways. The distinguished author of that article, Judge REDFIELD, has for years made railways a subject of special study. His opinion upon any branch of the law is entitled to great weight ; but his opinions upon questions, whether general or legal, connected with railways have a particular value.

He says: "There is confessedly a necessity for some legislative and judicial control of the railways in the country, which shall bring them all to the same point, that of promptness, uniformity of charges, and safety. * * These have become a necessity to the public interest. By promptness we do not mean rapidity of movement, but regularity and system, so that the public can know what to expect and what to depend upon. This can only be effected by some very stringent system of supervision, by which all the rolling-stock can be kept in the most perfect condition, as well as the road-bed and track, and that the rolling-stock shall be kept fully up to the business demands of the line. And this supervision can only be effected by stringent laws, stringently enforced. And to be of any practical avail, it must extend throughout the whole country. * * Railways must be regarded as indispensable public interests, before they can be put under such management and supervision as to secure the public accommodation, as a leading and primary motive to action."

The article then goes on to show that such supervision is as beneficial to the shareholder as to the public.

It then adds: "The same thing is true as regards *uniformity of charges* for freight and passengers. It is undeniable that this is one of the things impossible to be effected [by state legislation] upon our American railways which extend through different states, in all of which the laws are different, and in none of which has this matter of uniformity

of charges been sufficiently regarded. It is the one thing which alone will enable the railways and the people both to live, and conduct business upon fair grounds. And the want of some such stringent system of supervision, which should bring all charges to a uniform standard and a reasonable limit, is the very thing which has ruined many of the most productive lines of railway in the country." It might be added that it is also the very thing which is now almost crushing out the life of large sections of territory in the different states which depend for railway facilities upon corporations owned and managed in other states.

"The matter of *safety* too," says Judge REDFIELD, "in the passenger traffic upon railways is one of almost frightful importance, and at the same time one where there is absolutely no corrective except in the way of penalties and pecuniary mulcts, by way of damages for injuries inflicted through defective apparatus and want of due care. There should be some power able to insure to the public the perfect condition both of the track and the rolling-stock, at all times. * * * It will be impossible to establish any supervision which will be effective *except through the agency of the general government.*"

He then discusses and affirms the right of the "national government to control the railways of the country." He holds that the national government may "construct entire lines of railway at the public expense," or "delegate the same powers and functions to individuals."

But he does not allude to the commercial clause of the Constitution referred to by Mr. Justice MILLER, which at least, so far as regards lines of railways running to and connecting different states, seems to be a clear and ample

source of authority for congressional interference.

Certainly as respects such lines, why may not Congress provide by law for the safety of passengers on cars as they have done for the safety of passengers on water, by providing for the inspection of machinery, &c., &c.?

For many reasons any effective legislation respecting uniformity of charges must come from Congress.

First, it is a question whether, unless the right to do so is reserved in the charter, a *state* may interpose in this matter. Such interposition will be claimed to impair "the obligation of contracts," which a state may not do.

As to the course of legislation and judicial decision in the several states on the subject of corporate grants and reservations as respects railway charters, the article in the *Am. Law Review* (April 1867), above referred to, may be profitably consulted.

But if this power exists in a given state it cannot control roads outside of its boundaries, and, therefore, in many cases a state is without the power to remedy the evil of either exorbitant or discriminating tariffs.

Whether Congress can advantageously legislate on the subject of tariffs or charges is a matter which does not fall within our purpose to discuss more at length at this time. But that it could and should legislate upon the subject so as to better insure the safety of the lives and limbs of the travelling public by a thorough system of inspection of roadbeds, cars, machinery, and by providing rules for the management of trains, &c., will be admitted on all hands. And the main object of this note is to call attention to the question of the power of Congress, under the Constitution, over the railways of the country.

J. F. D.

*United States District Court, Eastern District of Pennsylvania.
In Bankruptcy.*

IN RE DAVID RUTH, BANKRUPT.

Under the present bankrupt law of the United States and the state exemption laws incorporated with it, the exemption of such property, real or personal, of the appraised value of \$300, as a bankrupt in Pennsylvania may elect to retain as exempt under the laws of the state, is not included in but is additional to the exception from the operation of the bankrupt law, of such necessary and suitable articles, not exceeding in value \$500, as with due reference, in their amount, to the bankrupt's family, condition, and circumstances, may be designated and set apart by the assignee, subject to the court's revision.

But this exception to the full value of \$500, ought not to be allowed in all cases, without discrimination or measure.

THE 14th section of the Bankrupt Law of 2d March 1867, 14 U. S. Laws 522, excepts from the operation of the assignment of a bankrupt's estate his necessary household and kitchen furniture, and such of his other articles and necessities, not exceeding in value, in any case, \$500, as shall be designated and set apart by the assignee, having reference, in the amount, to the bankrupt's family, condition and circumstances; also, his wearing apparel, and that of his wife and children, and his uniform, arms and equipments, if he is or has been a soldier in the militia, or in the service of the United States, and such *other* property as is and shall be exempt from attachment or execution by the laws of the United States, and such *other* property, *not included in the foregoing exceptions*, as is exempted by the laws of the state in which he is domiciled, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864. And it is enacted that the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the court.

The Act of Congress of the 19th May 1828, §§ 3, 4, U. S. Laws 281, had provided that the proceedings upon executions in the courts of the United States should be the same as were then used in the courts of each state; and had empowered the courts of the United States, by rules of practice, to make such proceedings conformable to any changes thereafter adopted by the legislation of the respective states. Through this act, and subsequent rules of practice adopted as authorized by it, the practice in the Federal

and state courts in 1864 was, in general, the same as to the exemption of the property of the debtors. The laws of some of the states exempted personal property to an amount exceeding in value \$500; and the laws of several states exempted real property to various greater amounts, extending, in certain states, even to the value of \$5000, if not beyond it. By the laws of other states the exemption was limited to subjects of the value, in the whole, of less than \$500. The laws of Pennsylvania exempted all wearing apparel of the debtor and his family, and all bibles and school books in use in the family, and, as to the debts contracted since 4th of July 1849, exempted such other property, real or personal, as he might elect to retain, to the value of \$300, to be ascertained, upon his request, by the valuation of sworn appraisers summoned by the officers levying the execution. The debtor was allowed to elect to retain this amount, out of any bank-notes, money, stocks, judgments or other indebtedness to him.

According to one of the forms which the judges of the Supreme Court of the United States have prescribed, under the authority conferred upon them by the 10th section of the bankrupt law, a debtor petitioning for adjudication and relief in bankruptcy must set forth, under a distinct head of one of the schedules annexed to his petition, a particular statement of the property claimed as excepted by the provisions of the 14th section of the act from the operation of his future assignment; giving each item and its valuation, and if any portion is real estate, giving its location, description, and present use. The statement is to be thus made in two divisions, one of them containing the property claimed to be excepted, which may be set apart by the assignee under the 14th section of the act, and the other containing the property claimed to be exempt by state laws. One of the general orders of the Supreme Court (Gen. Order XIX.) requires the assignee, immediately on entering upon his duties, to prepare a complete inventory of all the property that comes into his possession, and to make report to the court, within twenty days after receiving the deed of assignment, of the articles set off to the bankrupt by him, according to the provisions of the 14th section of the act, with the estimated value of each article, and allow to creditors twenty days from the filing of such report for taking exceptions to the determination of the assignee. There is a form appended (No. 20) of the schedule of property thus designated and set

apart by the assignees to be retained by the bankrupt, requiring specification of it under five heads, viz., necessary household and kitchen furniture, other articles and necessities, wearing apparel of bankrupt and his family, equipments, if any, as a soldier, other property exempted by the laws of the United States, property exempted by state laws.

In this case the bankrupt had exhibited in the proper schedule annexed to his petition, and under the proper head, a statement, in the two divisions prescribed, of personal property to the value of \$500, claimed by him as excepted, which might be set apart by the assignee, and other personal property to the value of \$291.75, claimed as exempt by the laws of the state. The assignee set apart, for the bankrupt's use, personal property of the appraised value of \$500, and no more, composed of items included in each of the two divisions of the bankrupt's claim of exception and exemption annexed, as above, to his petition. According to the assignee's inventory and the estimate of the appraisers, the whole value of the remaining personal estate was \$259.55. The real estate was appraised at \$2000.

"The bankrupt demands of the assignee that the additional \$300 worth of property exempted by the laws of Pennsylvania shall be set apart to him." This the Register certifies, adding that "the opinion of the court is required for the guidance of the assignee." The bankrupt demands, in effect, an exemption to the value, in the whole, of \$800.

It was objected that an exemption to this amount should not be allowed in any case. In support of the objection it was said, in this case and in another somewhat similar, that the legislation of the United States having assumed \$500 in value, and the legislation of the state having assumed \$300 in value, to be the greatest proper amount of exemption, a result of the two legislations combined, would extend the exemption to \$800, cannot have been intended, because it would be absurd. It was therefore argued that the exemption of \$500 under the Act of Congress, must be understood as including that of \$300 under the laws of the state, except as to bibles and school books, which alone were within the proper meaning of the phrase "other property," in the Act of Congress. Although a debtor might, under the law of the state, elect that real property of the appraised value of \$300 should be exempt, yet when he did so, he made it, according to this argu-

ment, a part of the \$500 in value exempted. At all events, it was contended that the twofold or cumulative exemption could only be allowed in a case in which the subjects of the two divisions were so different that those of the one kind could not be included in those of the other, and consequently that it should not be allowed in the present case where the whole exemption was under both divisions claimed from personal estate of the same general character.

It was answered that the assumed intention to limit the exemption to \$500 in value was not rightly attributable to Congress, and that the contrary became apparent on recurrence to the above-mentioned exemption laws of some other states which the Act of Congress had in effect incorporated with its provisions, these laws admitting exemptions to amounts vastly greater than \$500; and that even if this had been otherwise, the exemption of \$300 under the Pennsylvania laws could not be included in that of \$500 under the Act of Congress, because the subjects were different. The difference asserted was that the subjects of exemption under the state laws were, except as to their valuation, determined absolutely by the debtor's own arbitrary election, whereas, under the Act of Congress, the subjects of exemption were determinable by a designation which the assignee was to make, upon relative considerations of suitableness, depending upon the debtor's family and condition in life, and his former circumstances, and that this determination was afterwards judicially revisable. It was contended that the subjects were therefore different, and according to the relative sense of the "other property" in the Act of Congress, were independent of, and consequently additional to one another. According to this argument, besides wearing apparel, bibles, school-books, uniforms, arms and equipment, and property to the appraised value of \$300, arbitrarily designated by the bankrupt himself, the assignee is, with due reference to the bankrupt's family, condition, and circumstances, to designate such additional property as may not, in these respects be unsuitable, which cannot exceed, but may reach \$500 in value, and thus the whole may amount, in a proper case, to \$800, in addition to the wearing apparel and other specifically designated articles.

As to the special considerations which ought, under the Act of Congress, to determine the designation by the assignee, or to de-

termine its extension to such a maximum, nothing was said on either side.

The opinion of the court was delivered by

CADWALADER, J.—If the exemption laws of all the states had resembled those of Pennsylvania, there would have been great apparent force in the argument against allowing the twofold exemption under the state laws and the Act of Congress to extend in any case, in the whole, beyond the value of \$500. There would, however, have been difficulty in accommodating the argument to the words of the Act of Congress. Whether this difficulty could have been overcome it is unnecessary to consider, because, upon recurrence to the exemption laws of other states which are, in effect, incorporated with the Act of Congress, the argument loses all force or all applicability. The Act of Congress must, therefore, be interpreted with reference to other motives of legislation.

Proceedings in bankruptcy, where it is involuntary, resemble in many respects a general execution for the equal benefit of the creditors. Where bankruptcy is voluntary, the resemblance does not in all respects fail. It is foreign to the purpose of proceedings under such a bankruptcy that they should operate upon property otherwise exempt from execution, unless it is thus exempt under defective previous laws, which the bankrupt law is in this respect intended to improve. Under the present bankrupt law no such change was intended. On the contrary, the previous uniform system under state laws of exemption in the Federal and state courts is continued, as it had been established under the Act of Congress of 1828, and under subsequent rules of the Federal courts authorized by this act. In this respect the bankrupt law merely provides that the state exemption laws, thus previously adopted, shall still apply, so as to exclude their subjects from the operation of the proceedings in bankruptcy. The law further enacts in effect that there may in proper cases be an additional exemption, to be graduated with reference to the number, health, &c., of the members of the bankrupt's family, to his condition in life, social and otherwise, and to his former and recent, if not present circumstances. Confusion of the views of the present question has arisen from hastily assuming that it is a question of the absolute unmeasured allowance of an additional exemption to the value of \$500. The allowance is conditional, and is measured

not merely with reference to value, but also to subjects, and their suitability to personal requirements. The subjects must be necessities and other articles, which in character, as well as in amount and value, are suitable to his family, condition, and circumstances. There may be cases, few perhaps in number, in which, though he may own property of a value considerably exceeding \$300, it would sanction a fraud upon his creditors to allow him any part of the excess beyond it, except the specifically designated articles. For example, in a possible case a debtor who never had owned property of the value of \$300 beyond the amount of his debts might become a bankrupt for the very purpose of depriving creditors of recourse to assets in excess of this value. Such an attempt should never be successful. In ordinary cases, the property excepted should not, however, be of less value than \$200, in addition to the subjects of the state exemption laws to the value of \$300, and the specifically designated articles. In special cases the property additionally excepted may be of greater value; and in some extraordinary cases may be of the full value of \$500, making the whole value, including \$300 under the state laws, amount to \$800, in addition to that of the wearing apparel and other specifically designated articles.

In the Act of Congress the articles newly excepted are mentioned first, and those previously exempted by state laws are mentioned lastly. The more natural order of considering the two subjects in Pennsylvania, if not elsewhere, is, perhaps, to invert this arrangement. Thus, the assignee should first consider what exemption is claimed under laws of the state. As to the subjects of this claim of exemption, his only function is to see to their proper appraisal. In seeing to it he should proceed as conformably to the laws of the state as may be possible. The subjects of exemption and the specifically designated articles having been set apart, a more responsible duty is afterwards to be performed by him in designating the additional articles excepted under the Act of Congress.

In the present case I infer that if the bankrupt is not to obtain a further exemption than has been allowed, neither he nor any other party objects to the selection of the articles which he has received. He was mistaken in demanding the additional amount as of absolute right, independently of considerations relative to his family, condition, and circumstances. On the other hand, the

assignee was also mistaken if he supposed the Act of Congress to preclude him absolutely, under all circumstances, from allowing an exemption beyond the value of \$500 in the whole. Whether this bankrupt ought to have received more than has been allowed I have no certain means of deciding from what is now before me. This must be determined by the assignee, whose report, if the bankrupt persists in his claim, will be made hereafter through the Register.

District Court of the United States, Northern District of New York. In Bankruptcy.

IN RE WELLS AND SON.¹

A general assignment for the benefit of all his creditors, by an insolvent debtor, prior to the 1st of June 1867, is not necessarily fraudulent nor for the purpose of delaying or hindering creditors, and, therefore, not necessarily an act of bankruptcy.

Section 39 of the Bankrupt Act, in enumerating among acts of bankruptcy the fraudulent stopping of payment of his commercial paper by a banker, merchant, &c., embraces two cases:—

1. A *fraudulent* stoppage, which is *per se* an act of bankruptcy, for which proceedings may be immediately commenced; and
2. A stoppage not fraudulent, but which becomes an act of bankruptcy by continuing for fourteen days.

THE petition in this case alleges two acts of bankruptcy, viz.: First, That on or about the 10th of March, 1867, the said Alfred L. Wells & Son, being possessed of a certain estate and property (to wit, a stock of dry goods and other articles, together with divers accounts against persons to whom they had sold goods, &c.), made an assignment of the whole of them, *with intent to delay and hinder their creditors*; and Second, That on or about the 16th of March, 1867, being merchants and traders, they fraudulently stopped and suspended, and had not resumed payment of their commercial paper within a period of fourteen days.

The petition also shows that at the time above mentioned the firm was insolvent; that judgments had been taken against them, and the suits upon other demands against them had been commenced, and were being prosecuted to judgment and execution.

¹ We are indebted for this case to The Gazette.—EDS. AM. LAW REG.

The opinion of the court was delivered by

HALL, Dist. J.—The execution of a general assignment for the common and equal benefit of all their creditors is admitted ; but it is denied that it was executed with the intent to delay or hinder creditors. As there is no replication to the answer containing this denial, and as the case has been brought to a hearing on the petition and answer, this intent, if it be not conclusively presumed as a matter of law, must be regarded as disproved ; and as there is no allegation that the assignment referred to was made with intent to defeat or delay the operation of the Bankrupt Act, we are not now called upon to decide whether a general assignment making a disposition of the bankrupt's property substantially the same as that contemplated by the Bankrupt Act, can be considered an act of bankruptcy, if made in good faith before the first day of June last, and consequently before any petition could be filed under the act and for the single purpose of preventing a portion of his creditors from obtaining a preference over his other creditors.

We think there is no conclusive legal presumption that the assignment was made to delay or hinder creditors. It may, perhaps, be truly said it was made with intent to delay and hinder the particular creditors who were striving to obtain a preference over the other creditors of the respondents, by pressing the suits they had already commenced to judgment and execution ; but this intent is not such an intent as the Bankrupt Act contemplates. Such an assignment, under such circumstances, and with such intent, would not be held void under the statute of this state, which avoids conveyances made with the intent to delay, hinder, or defraud creditors, and notwithstanding the provision of the 35th section of the Bankrupt Act, that a sale, assignment, transfer, or conveyance not made in the usual course of business of the debtor, shall be *prima facie* evidence of fraud, we are of the opinion that, *under the denials contained in the answer* in this case, we cannot properly hold that the making of the assignment, under the circumstances stated, was an act of bankruptcy.

Upon the second allegation of an act of bankruptcy, the petitioners are entitled to an adjudication in bankruptcy against the respondents. It is true that the construction of the provision of the Bankrupt Act on which this allegation is based, is not entirely free from doubt, but the construction which justifies such an

adjudication has been adopted in another district, and is, as we think, a reasonable and just construction of such provision. It was contended upon the argument that this provision, which authorizes proceedings *in invitum* against any person "who, being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days," does not authorize such proceedings, unless the original stoppage or suspension of payment was fraudulent—no matter how long such suspension may be continued.

We understand that the United States District Court of South Carolina has decided that such is not the true construction of the provision referred to, and that its true construction requires an adjudication in bankruptcy against a banker, merchant, or trader "who has suspended and not resumed payment of his commercial paper within a period of fourteen days," although such suspension or stoppage of payment was not fraudulent; and this, we think, is the fair and proper construction. The provision embraces the two cases; the one of an original fraudulent stoppage of payment, in which proceedings may be instituted at once, and the other of a suspension of payment, not fraudulent and not *per se* an act of bankruptcy, but which, if continued for more than fourteen days, becomes an act of bankruptcy by its continuance.

This construction of the language of this particular provision under consideration is, we think, best calculated to carry out the general intentions of Congress, as expressed in the Bankrupt Act, and such construction, if not strictly required by, is certainly not inconsistent with the language of the particular provision alluded to.

It can hardly be supposed that Congress intended that the creditors of a banker, merchant, or trader, who had *fraudulently* stopped payment of his commercial paper, should be compelled to allow him fourteen days to consummate his fraudulent purposes, and perhaps secretly remove from the United States with the mass of his property before they could take proceedings against him. There is certainly no more reason for allowing such delay after a fraudulent act of that character than there is in a case where a bankrupt has fraudulently concealed or transferred a portion of his property. But when the suspension of payment is from necessity, *and without fraud*, the period of fourteen days is

properly allowed the honest trader, that he may, in case he is solvent, and is only temporarily embarrassed, take the necessary measures to enable him to pay his dishonored paper, and prevent his business being broken up by proceedings in bankruptcy. The accidental loss or miscarriage of expected remittances; the unexpected failure of a correspondent, or of a bank in which his deposits are kept; the failure of his debtors to meet their commercial paper, or any other of the many misfortunes and accidents incident to commercial and financial operations, may compel an entirely solvent and perfectly safe merchant or trader to suspend for a day or two the payment of his commercial paper; but a merchant of fair character, who is solvent and deserving of credit, can, by means of temporary loans or otherwise, provide for resuming payment of his commercial paper within the fourteen days allowed by the Bankrupt Act. A suspension continued for a longer period may well be considered as evidence of hopeless insolvency, or of a want of adequate capacity to carry on his business, and as entitling his creditors to take proceedings to secure the application of his property to the payment of his debts. Between these two classes—between the honest trader who suspends payment by reason of misfortune or accident, and the fraudulent one who stops payment that he may retain and secure his means for the future benefit of himself or family, to the exclusion of his creditors—Congress has, we think, very properly made a clear distinction—a distinction which can only be acted on by adhering to the construction heretofore given to the provision referred to by the only District Court which has within our knowledge passed upon this question.

Supreme Court of Pennsylvania.

CURRY v. SCOTT, THE ERIE AND PITTSBURGH RAILROAD COMPANY ET AL.

The directors of the Erie and Pittsburgh Railroad Company had power to receive subscriptions for all the untaken stock, and to issue certificates therefor; and the moment this was done the holder became a stockholder, and entitled to a stockholder's rights.

The law authorizes no distinction between the rights of one stockholder and those of another. If one has not paid his subscription in full he is a debtor for

so much of the subscription as remains unpaid, but is none the less a stockholder.

It is not to be admitted that an old stockholder had a right, to subscribe to the untaken stock, superior to the rights of one who owned no stock.

An Act of Assembly authorizing the issue of preferred stock did not work a change in the charter until accepted by the stockholders, but when so accepted the directors are authorized to issue the preferred stock.

The legislature may confer enlarged powers upon the managers of a corporation, with the assent of shareholders; and no one stockholder, by refusing his assent, can hinder the exercise of the enlarged powers.

THIS was a bill in Equity filed at Harrisburg, and certified to Philadelphia, where it was argued and decided.

The bill charges the incorporation of the defendant company with a capital stock of twenty thousand shares of \$50 each. That complainant is a stockholder. That the Act of February 10th 1865, which authorized the board of directors to receive subscriptions of all or any part of the unsubscribed stock of said company, under such regulations, "as to time and manner of such subscription, as said directors shall prescribe, any law or usage to the contrary notwithstanding; and the subscribers to said stock to have the same rights in said company as if they had been original subscribers thereto," was passed without complainant's knowledge and consent.

That he never approved of it, but had always refused to ratify it.

That at the time of its passage there had been subscribed or issued twelve thousand five hundred and forty shares which had been fully paid for to said company, leaving unsubscribed seven thousand four hundred and sixty shares.

That the board of directors accepted the Act of February 1865, and prescribed the manner in which the stock should be subscribed, and then permitted John Van M'Collum to subscribe the seven thousand four hundred and sixty shares, upon the payment of \$5 on each at the time of subscribing, and issued certificates of stock therefor.

That on the 21st March 1865, the legislature passed an act authorizing the directors of the company to issue a preferred stock to the amount of \$500,000, on which the holder "shall be entitled to receive, at all events, such interest or dividends not exceeding 8 per cent., as the board of directors shall fix at the time of issuing said stock—with the right of the holders thereof

to vote at all elections, and receive a share of all dividends over the special rate so fixed, equally with the common stock.

That it was the intention of the directors to issue said preferred stock.

That the officers of the company had been elected by illegal votes, based on this seven thousand four hundred and sixty shares of alleged irregular and void stock.

Prayer, That the said two Acts of Assembly be declared null and void ; and that the seven thousand four hundred and sixty shares of M'Collum be decreed to be given up and cancelled, and the election of January 8th 1866 be set aside ; and that defendants be enjoined from issuing the preferred stock.

The defendants demurred.

John H. Walker, for demurrer.

Benjamin Grant, contra.

The opinion of the court was delivered by

STRONG, J.—The objects sought to be obtained by the bill are mainly such as are attainable by a writ of *quo warranto* ; and it might perhaps be questioned whether they can be secured in a court of equity.

A portion of the relief sought, however, is such as a court of law cannot give, and it is not assigned as one of the grounds of the demurrer that the plaintiff has an adequate remedy at law. We proceed, therefore, to inquire whether the bill exhibits a case entitling the plaintiff to relief.

It avers, in substance, that the Erie and Pittsburgh Railroad Company, of which the plaintiff is a stockholder, having a portion of its authorized capital stock undisposed of, prescribed a time and manner for subscription of that which previously remained untaken ; that afterwards, and so far as it appears, at the time and in the manner prescribed, John Van M'Collum, one of the defendants, subscribed for all the stock that remained untaken, seven thousand four hundred and sixty shares ; that the company received his subscription ; that he then paid on account of each share \$5 ; that the company issued certificates of stock for the stock thus taken, and that at the annual election next succeeding he was permitted to vote said shares. It is not averred that there was any fraud in the subscription, or that the plaintiff or any

other person was denied the privilege of subscribing ; or that the stock taken by M'Collum was worth more than its par value, at which he took it ; but the bill rests upon the assumption that the directors of the company had no power thus to dispose of their untaken stock ; and that M'Collum could not thus acquire the rights of a stockholder to vote at an election. The bill also avers that an Act of Assembly was passed on the 10th day of February 1865, by which it was enacted that the board of directors of the Erie and Pittsburgh Railroad Company be authorized to receive subscriptions for all or any part of the unsubscribed stock of said company, under such regulations as to time and manner of such subscription as said directors should prescribe, any law or usage to the contrary notwithstanding ; and that the subscribers to said stock should have the same rights as if they had been original subscribers thereto. Provided, that any person subscribing therefor, should pay at the time of subscribing \$5 on each share subscribed. But the plaintiff insists that this act is of no force because it is an unwarranted infringement upon the rights of those who were stockholders at the time of its passage ; and much of the argument has been expended in assailing and sustaining the validity of the enactment. We are of opinion, however, that the discussion was unnecessary ; for without the act the directors of the company had power to receive subscriptions for all the untaken stock, and issue certificates therefor, and the moment this was done the holder became a stockholder, and entitled to the rights of a stockholder.

The company was incorporated without any appointment of commissioners to receive subscriptions for stock ; but it was enacted that the stock should consist of twenty thousand shares, of \$50 each.

It was not required that any portion of it should be subscribed or paid in before the organization of the company ; but the corporation was endowed at once with all the rights and privileges conferred by the general Railroad Act and its supplements. Of course such subscriptions for stock were authorized after the organization until the authorized amount had been taken ; and what else do new subscribers become than stockholders having equal rights with others ?

The law authorizes no distinction between the rights of one stockholder and those of another. If one has not paid his sub-

scription in full, he is a debtor for so much as remains unpaid ; but he is none the less a stockholder.

It is insisted, however, that the directors had no right to allow M'Collum to subscribe, and thus obtain the untaken stock, because it belonged to the old stockholders, and it should have been sold for their benefit, or they should have been allowed to take it in proportion to the shares they held.

It would be a sufficient answer to this to say the bill does not allege that the plaintiff, or any of the old stockholders offered, or that they are willing to take it at par ; nor does it allege that the stock could have been sold at a higher price than par. It therefore sets forth nothing that is injurious to the complainant. But when it is said that the untaken stock belongs to the old stockholders, more is meant than can be admitted. In a certain sense the assertion is true. But it is not to be admitted that an old stockholder had a right to subscribe to the untaken stock superior to the rights of one who owned no stock. If this were so, a first subscriber might compel all the remaining untaken stock to be sold, or at least would have a right to exclude any other person from subscribing.

The cases upon which the plaintiff relies are inapplicable to the case now in hand. In *Gray v. The Portland Bank*, 3 Mass. 364, it was held that when a banking company had been incorporated with a capital not less than one sum and not greater than another, and had commenced business with the smaller capital, and afterwards voted to increase it to the larger, those who held the stock in the capital first raised had a prior right to subscribe to the new stock.

The case was really decided by two judges of a court consisting of five ; but assuming it to be sound law, it is unlike the case we have. Here is no increase of capital, but a filling up of one both authorized and required. This is a substantial difference. So the case of *Reese v. The Bank of Montgomery County*, 7 Casey 78, decides nothing more than that untaken stock is held by the corporation in trust for the corporators, and must be disposed of for the benefit of all, that it cannot be disposed of unequally to the corporators ; and that if so disposed of, each corporator injured may have his action against the corporation. Neither of these cases decides that a stockholder has any greater rights than a stranger to subscribe to original stock untaken ; and

we are unable to see why the directors of the Erie and Pittsburgh Railroad Company could not permit M'Collum to subscribe for all the untaken stock, why they could not issue certificates to him when he had subscribed, and why, having thus become a stockholder, he could not vote at an election.

The Act of 1865, then, was unnecessary ; it was but a re-enactment of that which had been previously enacted.

The bill also assails another Act of Assembly, passed on the 21st day of March 1865, by which the board of directors of the company was authorized to issue preferred stock.

It avers that the plaintiff never agreed to any such issue, that the act was procured without his assent, and that he did not know of its passage until months after it had been enacted.

It is also charged that it is the intention of the company to issue such preferred stock ; but why this is illegal, or how it is injurious to the plaintiff, the bill does not show.

Doubtless the Act of Assembly did not effect an alteration in the charter until accepted, but the bill does not deny that it was accepted by the stockholders. It admits it was, by the board of directors. Clearly, if accepted by the stockholders, the directors are authorized to issue a preferred stock, and their doing so is no wrong to the complainant, though he may be opposed to their action. It is not to be questioned that the legislature may confer enlarged powers upon the managers of a corporation with the assent of the shareholders, and that no one stockholder, by refusing his assent, can hinder the exercise of the enlarged powers.

From what has been said it will be seen that in our opinion the plaintiff's bill exhibits no case calling upon a court of equity to grant him relief.

The demurrer must therefore be sustained, and the bill dismissed.

*Supreme Court of Pennsylvania.***FARNHAM, KIRKHAM & CO. v. THE CAMDEN AND AMBOY
RAILROAD COMPANY.**

A carrier may by special contract limit his liability except as against his own negligence.

Where a person delivers goods to a carrier and receives a bill of lading expressing that the goods are received for transportation subject to the conditions on the back of the bill, by one of which the carrier's liability is limited to a certain rate per lb., this constitutes a special contract by the parties, and the carrier, in the absence of proof of negligence, is only liable at the rate agreed upon.

Goods were received by defendants, a railroad company, under a special contract as set forth in the preceding paragraph, and were safely carried to their wharf at New York, and placed on the wharf ready for delivery, but before the plaintiffs had notice of their arrival or opportunity to remove them, a fire broke out on board a steamer of the defendants lying at the wharf, which entirely consumed the boat, and also the wharf and the goods thereon. There was no evidence as to the origin of the fire. *Held*, that plaintiffs could not recover more than the special rate agreed upon without proving negligence of the defendants.

THIS was a case stated to determine the liability of the defendants under the following circumstances. The plaintiffs delivered to defendants for transportation to New York certain bales of goods, of the weight of 3220 pounds and the value of \$6778.24. A bill of lading for the goods was signed by an agent of defendants and delivered to plaintiffs, who accepted and transmitted it to New York to their agent to receive the goods. The bill promised to deliver the goods "subject to the conditions expressed on the back of this receipt," the material parts of which were as follows: "The responsibility of the company as carriers of the within named goods is hereby limited so as not to exceed one hundred dollars for every 100 lbs. weight thereof, and at that rate for a greater or less quantity, the shipper declining to pay for any higher risk. The company will insure to any amount if desired."

The defendants were a corporation created by the state of New Jersey, and by the law of that state were authorized to limit their liability in the manner above stated, upon giving notice in the bill of lading and by a general notice posted in the company's office for receiving freight. Due notice was given in these ways in this case.

The goods were safely transported to New York, where they arrived on the night of Saturday July 9th or on the morning of

Sunday July 10th 1864, and were placed under a shed on the wharf ready for delivery, and while there and before the plaintiffs had notice of their arrival or opportunity to remove them, a fire broke out on board a steamboat called the John Potter, belonging to the defendants and then lying at the aforesaid wharf, which totally consumed the said steamboat, wharf and sheds and all the goods thereon, including the plaintiffs' bales. The origin of the fire was totally unknown; four watchmen employed by defendants being on duty at the time on the wharf and boat and the crew on the boat.

Defendants admitted their liability for \$8220, being at the rate of \$1 per lb., and had paid that amount without prejudice; but the plaintiffs claimed \$6778.24, the value of the goods.

The judgment at Nisi Prius was for defendants, and the plaintiffs then had the case certified to the court in banc.

Henry M. Phillips, for the plaintiffs.—The carrier's duty is to transport goods, and he is legally responsible for all losses from whatever cause arising, except the acts of God and the public enemy.

Regarding him as an insurer, the law allows him to demand a premium proportioned to the hazard of his employment: *Coygs v. Bernard*, 2 Ld. Raym. 909; *Same v. Colton*, 1 Id. 546, 655, 1 Salk. 143; *Riley v. Howe*, 5 Bing. 217; *Lockhart v. Lichten-thaler*, 10 Wright 151, 4 Am. Law Reg. N. S. 15.

Whilst there are a number of cases that concede that carriers may, by express agreements, avoid their common-law liability as insurers, yet such a contract will not excuse the carrier from gross carelessness or negligence; and the onus of showing that the cause of the loss was within the terms of the exception, and also that there was no negligence, lies on the carrier: *Angell on Carriers*, §§ 267, 268, 275; *Hollister v. Nolen*, 19 Wend. 234; *Cole v. Goodwin*, Id. 251; *Sager v. Railroad Co.*, 31 Maine 228; *Swindler v. Hilliard*, 2 Richardson 286; *Davidson v. Graham*, 2 Ohio 133; *Gould v. Hill*, 2 Hill 623; 2 Kent 607, note c; *C. and A. Railroad Co. v. Baldauf*, 4 Harris 67; *Penna. Railroad Co. v. McCloskey*, 11 Id. 526; *Ill. Central Railroad Co. v. Read*, 37 Ill. 87; *Hooper v. Wells*, 5 Am. Law Reg. N. S. 16.

The duty of a carrier is not fulfilled by simple transportation

from port to port. The goods must be landed and the consignee notified of their arrival: *Owners of the Mary Washington v. Ayres*, 5 Am. Law Reg. N. S. 692.

All that the bailor has to do, in the first instance, is to prove the contract and the delivery of the goods, and this throws the burden of proof that they were lost, and the manner they were lost, on the bailee, of which we have a right to require very plain proofs: *Beekman v. Shouse*, 5 Rawle 179; *Clarke v. Spence*, 10 Watts 337.

The case of *Swindler v. Hilliard*, 2 Richardson 286, is remarkably like the present. There the verdict showed that cotton in bales was burnt on board a boat running between Charleston and Columbia, and there, as here, was proven a special contract exempting the carrier from dangers of fire or navigation. How the fire originated was unexplained, and from the evidence there was in that case at least as much care and watchfulness as in the present one. But all the judges concurred in the opinion that the burden of proof as to cause of the fire, rested on the carrier, and in the absence of this, the inference was against him. This case is cited and approved in Angell on Carriers, § 267.

J. E. Gowen, A. I. Fish and St. George T. Campbell, for the defendants.—1. A carrier may limit his liability: *Southcote's Case*, 4 Coke 84 (that this is still authority, see *Farmers', &c., Bank v. Champlain Trans. Co.*, 23 Vt. 205); *Paradine v. Jane*, Aleyn 26; *Morse v. Slue*, Ventris, pt. 1, 190, 238; *Kenrig v. Eggleston*, Aleyn 93; *York Co. v. Central Railroad Co.*, 3 Wall. 107; *Peninsula, &c., Co. v. Shand*, 11 Jur. 771; *Dorr v. N. J. Steam Nav. Co.*, 1 Kernan 484; *Bingham v. Rogers*, 6 W. & S. 495; *Lang v. Calder*, 8 Barr 479; *Camden, &c., Railroad Co. v. Baldauf*, 4 Harris 67; *Chouteaux v. Leech*, 6 Id. 224; *Whitesell v. Crane*, 8 W. & S. 373; *Van Toll v. S. E. Railway Co.*, 12 Scott 75.

2. A special acceptance, as in this case, changes the rule of liability of the carrier. *Steamboat New World v. King*, 16 Howard 475; *Citizens' Ins. Co. v. Marsh*, 5 Wright 394; *Hays v. Kennedy*, Id. 378; *Thorogood v. Marsh*, Gow's Rep. 105; Story on Bailments, § 551, 7th ed.; *Peck v. N. S. Railway Co.*, 32 Law Journal Rep. 241.

3. A loss in a case like the present is not presumed to be the

fault of the carrier, so as to cast on him the burden of proof. It is true that in the case of a common carrier, who has made no special contract with his customer, the fact of the non-delivery of the goods intrusted to his charge is alone sufficient to render him responsible, but there the question of negligence is not in issue. He is held responsible because his undertaking was that of an insurer, and, negligent or not, he must make good the loss. He was paid for insuring the delivery of the goods, and cannot complain of being held to his obligation. But a private carrier, or any other ordinary bailee for hire, is liable only for negligence, and is not to be presumed guilty until he prove his innocence. Where he fails to deliver the articles committed to his custody, he must, of course, give some reasonable account of the circumstances on which he relies as an excuse. That obligation is necessarily implied even where the bailment was gratuitous, and the silence of the bailee under such circumstances would, from the very necessity of the case, be conclusive evidence of the grossest negligence or even fraud. But where the non-delivery is accounted for, and it does not appear that there was any negligence on the part of the bailee, the maxim *quod non apparet, non est*, will apply as in other cases: *Beekman v. Shouse*, 5 Rawle 189; *Clark v. Spence*, 10 Watts 335; *Goldey v. Penn. Railroad Co.*, 6 Casey 242; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard 384; *Marsh v. Horne*, 5 B. & C. 243; Angell on Carriers, § 276; Story on Bailments, § 573; and Greenleaf on Evidence, § 218; *Sager v. The Railroad Company*, 31 Maine R. 228. See also the elaborate opinion of PARKE, B., in *Wild v. Pickford*, 8 M. & W. 460.

4. The defendants offered to receive the goods without limitation as to responsibility, if paid a compensatory rate. It is like the case of receiving goods of a certain value at one rate, and those of higher value at a higher rate. The plaintiffs having chosen the lower rate should not have the higher indemnity.

The opinion of the court was delivered by

THOMPSON, J.—It does not admit of a doubt, that a common carrier may, by a special contract and perhaps by notice, limit his liability for loss or injury to goods carried by him, as to every cause of injury excepting that arising from his own or the negligence of his servants. A great variety of cases cited in the very

able argument of the learned counsel for the defendants, establishes this as the rule in England, from *Southcote's Case*, 4 Coke's Rep. 84, A. D. 1601, down to *The Peninsular and Oriental Steam Navigation Company v. The Hon. Farquar Shand*, 11 Jurist 771, in 1865. The same rule generally holds in the several states in this country, as will appear in Story on Bailments, § 549, notes (a) and (b), *Dorr v. New Jersey Steam Navigation Company*, 1 Kern. 484, and in the Supreme Court of the United States, *York Co. v. The Central Railroad Co.*, 3 Wall. 107. This has long been the rule in this state, as is shown by *Bingham v. Rogers*, 6 W. & S. 495; *Lang v. Calder*, 8 Barr 479; *The Camden and Amboy Railroad Co. v. Baldauf*, 4 Harris 67; *Chouteaux v. Leech*, 6 Id. 224; *Goldey v. Pennsylvania Railroad Co.*, 6 Casey 248; and *Pennsylvania Railroad Co. v. Henderson*, Leg. Int., vol. 28, p. 248, 1866. That there was a special acceptance limiting the defendants' liability to \$1 a pound in case of loss or destruction in this case, is among the facts found in the case stated. The bill of lading duly executed and signed by the agent of the defendants containing the limitation, it is agreed, was delivered to the plaintiffs, accepted by them, and remitted to their agent at New York as his authority to receive the goods. These, therefore, were the terms on which the transporters shipped their goods, and on which they were received to be transported. As this was a limitation of the common-law liability, we are to presume, of course, that the charge for transportation was in proportion to the risk, an element of charge in all such cases. The condition of shipment on the bill of lading shows this by expressing the limitation to be, because of the "shipper declining to pay for any higher risk." We have, therefore, a contract to transport goods under a special agreement as to liability, and a consideration based, we must presume, on the undertaking in its limited form. This limitation, we are warranted in saying, took the case out of the law of common carriers and carried it into one of the numerous classes of bailments, and it henceforth became liable to be governed by the law of the class. The reason will be apparent on a moment's reflection. The common law defines the duty and the liability in the one case—in the other the law is set aside by agreement of the parties, and they make a law for themselves, and thus they stand on the relation they create and not on the law of common carriers.

By the common law the carrier is an insurer of the goods intrusted to him, excepting so far as they are damaged by the act of God or public enemies. By a contract limiting liability, he is an insurer by agreement and according to its terms. If there be a loss, the agreement furnishes the extent of liability, and the bailor is confined to that unless he can show that the loss occurred from the wilfulness or negligence of the carrier. His liability is as a private carrier or bailee, as a consequence of the limitation. This is settled in various forms of expression, in numerous books and cases of authority. In Angell on the Law of Carriers, § 268, it is said: "Therefore, as there has been occasion before to show, that in cases of contract, and by means of notices, common carriers descend to the situation of only private carriers for hire." In *York County v. The Central Railroad Co.*, *supra*, this language is found: "By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee, a private carrier for hire." In *Goldey v. The Pennsylvania Railroad Co.*, 6 Casey 242, we said the same thing in these words: "The most it (the limitation) can do, is to relieve them from those conclusive presumptions of negligence which arise, when an accident happens that is not inevitable even by the highest care, and to require *that negligence be actually proved against them.*" In *The N. J. Steam Nav. Co. v. The Merchants' Bank*, 6 How. 384, the principle is thus stated: "The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, lies on the libellants, which would be otherwise in the absence of any such restriction." The same principle appears in *Marsh v. Horne*, 5 B. & C. 243, where the limitation as to the extent in value of liability, was held to vary the relation and require proof of negligence against the carriers. So in *Harris v. Packwood*, 3 Taunt. 264, this rule was applied. See also to this effect, Angell on Carriers, § 276; Story on Bail., § 573; 2 Greenl. Ev., § 218; and *Sager v. The Railroad Co.*, 31 Maine R. 228. Without pursuing further this line of thought, we must proceed to determine how this case stands affected by these principles.

The plaintiffs shipped goods on the 8th of July 1864, by the defendants' line, to New York, under an acceptance of limited liability as well as notice.

The goods were safely carried by the defendants to their wharf at New York, and placed under a shed on the wharf ready for delivery, but before the plaintiffs had notice of their arrival or opportunity to remove them, a fire broke out on board a steamer of the defendants lying at the wharf, which entirely consumed the boat with her cargo, and also the wharf and shed and the goods therein, including the goods of the plaintiffs. The origin of the fire remains unknown. Watchmen employed by the defendants were on duty at the time, and the crew of the steamer were on board. These facts all appear in the case stated. It also appears that the defendants have paid to the plaintiffs the full amount of liability stipulated for and assumed in case of loss in the bill of lading. Are they bound to the extent of the entire loss? If so, the exception or limitation would amount to nothing; not, it is true, because the limitation is void, but on a question regarding the burden of proof. Assuming the contract, or special acceptance of the goods to be carried by the defendants, to bring them within the doctrine applicable to bailments for compensation, the rule seems clearly to be, "that where a demand of the thing loaned is made, the party must return it, or give some account how it was lost. If he shows a loss, the circumstances of which do not lead to any presumption of negligence on his part, then the burden of proof might perhaps belong to the plaintiff to establish it:" Story on Bail. § 278. "But if a suit should be brought against the pawnees for a negligent loss of the pawn, then it would be incumbent upon the plaintiff to support the allegations of his declarations by proper proofs, and *onus probandi* in respect to negligence would be thrown on him:" Id. § 389, and note 4. "With certain exceptions, which will hereafter be taken notice of (as to innkeepers and common carriers), it would seem that the burden of proof of negligence is on the bailor; and proof merely of the loss is not sufficient to put the bailee on his defence:" Id. § 410. The text is supported by many authorities. The common law, consistent with itself in this, as in all other cases, lays the basis of this rule in the presumption that every person is presumed to do his duty until the contrary is proved. This is a great modification of the Roman law, which held the acts of faithlessness in a bailee as infamous, and compelled him to acquit himself thereof by proof. The French rule as to proof is the same. The rule in England

and in many of the states, if not all, is what Story states it to be *supra*. See *Marsh v. Horne*, 5 B. & C. ; and *Harris v. Packwood*, 3 Taunt. *supra* ; and *Wild v. Pickford*, 8 M. & W. 460. In *Beekman v. Shouse*, 5 Rawle 179, speaking of a case of special acceptance to carry, and of suit against the bailee, ROGERS, J., says: "Less than positive proof" (why the goods never reached their destination) "would suffice ; but some account should be given from which the jury would be warranted to infer that the goods had either been discharged or had been lost by accident, or had gone into other hands than the defendant's or his agents." This case shows that where a bailee accounts for a loss, in a way not to implicate himself in a charge of negligence, this is a sufficient defence, unless the plaintiff prove negligence. This is the plaintiff's reply to the plea in excuse of performance. It is an affirmative position, and must be proved by the party alleging it.

It is true, the plaintiffs in the first instance, taking the present case in illustration, must have shown, if it had been tried in the ordinary way, that they delivered the goods to the defendants to be carried to New York, that their agent called for them and could not get them ; there they might rest to hear the reply, and that would be proof that the goods were accidentally consumed by a fire breaking out on the steamboat at the wharf, which consumed the boat, the wharf and buildings of the defendants, and the goods in them, including the plaintiffs' ; that the boat had its complement of men on board, and the defendants' four watchmen on the wharf, but from these facts negligence could not be inferred. The plaintiffs' reply would be, "All that may be true ; but the fire originated in your negligence." Is it not perfectly clear that, as that was not inferable from the defendants' own case, that the plaintiffs must prove it ? This is not to be doubted. The same doctrine with that cited above is also to be found in *Clark v. Spence*, 10 Watts 335, in *Goldey v. Penna. Railroad Co.*, 6 Casey, *supra*, and in *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 384. We think, therefore, that as the contract to carry these goods was as bailees for hire, and not as common carriers, and as they did carry them according to their agreement to the terminus of their line, and they were there destroyed by fire, the defendants are not liable, in the absence of proof of negligence, to respond to the plaintiffs' claim. The doctrine is firmly settled,

that a common carrier cannot limit his liability so as to cover his own or his servants' negligence. Nor do I suppose this possible of any bailee. But it is clear that by contract he may be placed in the position of a limited insurer, excepting negligence, instead of an insurer against everything but the act of God or public enemies. If he be compensated only for the former risk instead of the latter, at the choice of the consignor, it would be contrary to common honesty to compel him to make good a risk he is not paid for assuming. We think this case was well decided at *Nisi Prius*, and the

Judgment is affirmed.

WOODWARD, C. J., dissented as to the *onus probandi*.

THE CONSTITUTIONALITY OF THE EXEMPTION CLAUSE OF THE BANKRUPT ACT.

[An article having appeared in a previous number of this Journal (October 1867), on the constitutionality of the concluding exemption clause in the Bankrupt Act, we give, by request of the framer of the bill, the remarks of Senator POLAND in the course of the earnest and very able debate on this portion of the act in the Senate. See Congressional Globe, February 2d 1867, page 962, &c.—Eds. AM. LAW REG.]

Mr. POLAND.—Mr. President: I confess that were it not for the very confident manner in which members of the Senate, whose opinions are entitled to very great respect, especially upon legal subjects, have declared their opinion that this adoption of the Homestead Exemption Laws of the different states renders this law open to the objection that it is not uniform, I should have felt that the objection was entirely frivolous.

I think, if it were in our power, if it were possible for us to adopt the systems of the different states in relation to the exemptions in favor of poor debtors, every member of the Senate would say that as a matter of discretion, as a matter of judgment, as a matter of prudence, as a matter of safe and proper legislation, it was better to leave that subject to be regulated by the state legislatures, who know the circumstances, the wants, the condition of all their inhabitants, rich and poor, better than we can. All would agree that it had better be left to them to say what mercy

should be shown to the poor debtor, how the balance should be struck between the creditor and the debtor in their respective localities, than we can determine here in this Senate Chamber.

This is not the objection; it is that under the Constitution we have not the power; that if we leave any exemptions at all in favor of the debtors who either voluntarily go into this system for the purpose of becoming relieved of their debts, or are driven into it by their creditors, if anything is to be left to them that does not go into their assets for division among their creditors, if anything is to be doled out to them or retained to them out of their property, it must be by some uniform rule that must be written down in the law itself.

Mr. President, it seems to me that this is not necessary in order to make this a uniform system of bankruptcy. All the states have exemption laws, and they are different in their terms. Some exempt a greater amount of real estate than others; a greater amount of personal property is exempted in some states than in others; but all the states have laws on the subject. They have regulated it according to their own judgment. They say that a debtor may, for his own subsistence and for his family, retain a certain amount of property that shall not be liable to be taken by any legal process for payment of his debts. No question is raised here, none ever has been raised, but that those state laws are entirely constitutional. It has been decided over and over again that the states may make additional exemptions of property as against debts that were already in existence at the time. So no question arises but that the state laws, providing that certain property may be retained by debtors against their creditors, are valid and constitutional and binding.

Now, what does this bill propose to do, as the House passed it? We propose simply to get up a law and adapt legal machinery to it, by which all the property of every bankrupt throughout the United States that is liable for the payment of his debts may be taken and administered and distributed equally among the creditors. This is all this amounts to. If there were no exemptions by state laws and we were to make an exemption; if by existing laws all the property of every debtor throughout the country was liable for the payment of his debts and we were to undertake to establish a system of administration throughout the entire country, I should agree, I think, that we must make an

exemption that should be uniform in all the states ; but that is not what we attempt to do. By this bill we lay hold of, we seize all the property of every bankrupt that is liable for the payment of his debts by law, against which the creditors have any right to proceed by any process in the state courts, or in the United States courts ; and we say that all that property shall be taken and be distributed in a particular way equally among all the creditors.

Is not that uniform ? In order to comply with this requirement of the Constitution, to have the system of bankruptcy uniform, is it necessary that it must operate in every state precisely alike ? Are there not a great variety of contracts that are binding and legal and valid and hold a man's property in one state that would be entirely invalid and inoperative to hold his property in another state ?

But it may be said that this proves nothing, because a contract valid by the laws of the state where made must be valid everywhere. But under the Bankrupt Law of 1841 the question arose in relation to statute liens. I mentioned the other day the controversy that arose in New England, beginning between Judge STORY and Judge PARKER, who was then Chief Justice of New Hampshire, in relation to our New England attachment liens ; I believe they are not known, out of New England, in any part of the United States as an ordinary process. With us in New England, when a man brings an action for the collection of a debt, if he can find property of the debtor, he sends out the sheriff and seizes it upon the writ in advance of any judgment, without filing any affidavit that the party is going to abscond or has property concealed. It is a matter of right with him. The Bankrupt Law of 1841 provided that liens upon property should be saved from the operation of the Bankrupt Law. The question arose whether these statute liens in New England came within the meaning of the Bankrupt Law, and it was eventually settled that they did ; they were sustained.

It was utterly impossible that any such lien could exist in any state out of New England under any state law ; there were no such liens on property elsewhere. If the Bankrupt Law of 1841 protected those liens upon property in New England, it established a rule for New England that was different from that established in any other state, and saved a kind of claims upon pro

perty which in any other state could not exist; and these were not like contracts that were entered into in one state which would be good everywhere, because these could have no force or effect out of the state, could not be enforced in any other place. And yet the Supreme Court of the United States held that the recognition of the state liens by that bankrupt law did not render it liable to the objection of want of uniformity in the constitutional sense. (*See Peck v. Jenness*, 7 Howard 612.—ED. AM. LAW REG.)

I do not desire to enter into any extended discussion. Enough has been said by other senators in relation to this question, so it is understood in all its bearings; and it seems to me that it is entirely clear that the adoption of these different homestead exemptions of the different states does not prevent the law from being uniform in a legal sense. I might say that when the bankrupt law of 1841 was under discussion in Congress, an amendment was adopted in the House by a very considerable majority, embodying the very provision that is contained in this bill, and that amendment was moved by a member of Congress who is now one of the judges of the Supreme Court of the United States. Eventually that amendment was struck out by a small majority, but it was at one time adopted, and adopted upon the motion of a gentleman who is now one of the judges of the Supreme Court of the United States.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MAINE.¹

SUPREME COURT OF MASSACHUSETTS.²

SUPREME COURT OF MICHIGAN.³

SUPREME COURT OF NEW YORK.⁴

SUPREME COURT OF VERMONT.⁵

ACCOUNT STATED.

The plaintiff claimed to have left a draft with a bank, for collection,

¹ From W. W. Virgin, Esq., Reporter; to appear in 54 Me. Rep.

² From Hon. Charles Allen, Reporter; to appear in Vol. 13 of his Reports.

³ From Hon. T. M. Cooley; to appear in 16 Mich. Rep.

⁴ From Hon. O. L. Barbours; to appear in Vol. 48 of his Reports.

⁵ From W. G. Veazey, Esq., Reporter; to appear in 39 Vt. Reports.

on the 24th of July 1856. His bank-book was written up as early as August or September 1856, and balances were struck and the vouchers delivered up to him repeatedly, afterwards, until 1859, when he drew out of the bank the balance remaining to his credit. In September 1856 he knew, or with reasonable attention might have known, that the draft was not credited to him on the books of the bank; yet he omitted to bring the matter to the notice of the bank until the spring of 1862. *Held*, that this was a *stated account* not objected to within a reasonable time; so clearly so that it was not, under the evidence, a question proper for the consideration of the jury, whether the delay was sufficiently accounted for: *Hutchinson v. The Market Bank of Troy*, 48 Barb.

Held also, that the judge properly refused to charge that under the circumstances the plaintiff was *absolutely and conclusively* bound by the stated account, and could not recover of the bank the amount of the draft. The true rule in such cases is that the stated account is conclusive upon the parties, unless the plaintiff is able to impeach it by showing, affirmatively, fraud or mistake: *Id.*

ACTION.

For levying Illegal Taxes.—As the statute directs the supervisor to levy upon the township the taxes which are specified in the certificate made to him by the township clerk, he cannot be made liable in trespass for so doing, even though some of the items are illegal, provided the certificate does not show the illegality: *Wall v. Trumbull and Smith v. Crittenden*, 16 Mich.

For allowing Illegal Demands.—A member of the township board is not liable in trespass to one who is taxed to pay an illegal demand which has been allowed by the board, where they had jurisdiction to pass upon the demand and only erred in judgment. Jurisdiction of ordinary demands is obtained by their mere presentment; and where the claims are of a class which are only referred to the board by a special statute and vote, the presentation of a claim as one of the class covered by the statute and vote is sufficient to call into exercise the judicial functions of the board to determine whether it is so in fact. And in passing upon this question the members are entitled to the same immunity as judges of courts: *Wall v. Trumbull*, 16 Mich.

The facts that the board allowed the demand without proof under oath, on the oral statement of one of its members, who was familiar with the facts, and that the claimant was not present in person, do not invalidate the allowance. There is no impropriety in claims being handed in advance to a member of the board for presentation, or in the members acting upon their own knowledge without other proof: *Id.*

AGENT.

Authority of a Factor to act without Instructions.—In unforeseen circumstances of necessity or great urgency, a factor has an implied authority to act for his principal, irrespective of his instructions or the ordinary usages of trade, in adjusting contracts and claims and disposing of property; and a factor who has so acted, in good faith and with a sound discretion, under the circumstances as they then appeared, will not be

liable for the consequences, although it turns out that his course was disadvantageous to his principal: *Greenleaf v. Moody*, 13 Allen.

The owner of hay in Maine consigned it to New Orleans to be sold, during the rebellion. The military authorities of the United States bought a portion, agreeing to pay for it in cash, and seized the remainder; and afterwards refused to pay for any of it except in government certificates of indebtedness, bearing interest, to be taken at par. The consignees, acting in good faith and according to their best judgment and the usual custom of factors at New Orleans at that time, but without notice to the owner, accepted these certificates of indebtedness, and shortly afterwards sold the same at ninety-three cents on the dollar, which was then their market value there. The owner was ignorant of this custom. *Held*, that the factors were not liable to the owner for the discount of seven per cent. made in selling the certificates of indebtedness: *Id.*

ARBITRATION AND AWARD.

Uncertainty — Mutuality — Finality — Submission — Partnership.—

When one article of an award is, in itself, so complete and independent of the rest of the award, that its separate enforcement would work no injustice, a party may declare and recover upon it, even though the other portions of the award are void: *Lamphire v. Cowan*, 39 Vt.

If the decision is certain, uncertainty in the reasoning which led to it will not invalidate the award: *Id.*

An award between partners, relating to the disposition of partnership debts and assets, may be certain though their amounts are not stated, if without such statement they are sufficiently identified: *Id.*

An award that one party shall pay a stranger a debt for which both parties are bound, is valid as between the parties to the award: *Id.*

An award need not always provide a method of enforcement. It is often impossible, when partnership assets and debts are apportioned. Such an award may be valid between the partners, though it does not and cannot affect the rights of the creditors or debtors of the partnership: *Id.*

If by manifest implication that appear, which, if positively expressed, would render the award good, that is sufficient to support it: *Id.*

(When an obligation is so thrown upon one party as to be but a portion of the consideration for the award in his favor against the other party, the performance of that obligation, if not provided for by the award, may be treated, without injustice, as a condition precedent to his recovery on the award, so that on proof of its performance he ought to recover.)—*STEELE, J.*: *Id.*

An award which settles a partnership and divides its assets and liabilities as between the partners, and establishes their rights and duties toward each other, is mutual and final: *Id.*

The submission embraced "all matters of difference." It must be presumed in absence of evidence to the contrary, that all matters passed upon by the arbitrators were matters of difference, and that all matters of difference were passed upon: *Id.*

BAILMENT.

Distinguished from Sale.—A receipt by which A. acknowledges to

have received of B. a sewing-machine, to be returned in three months, with condition added that if A. pays B. \$60 within the three months, the receipt shall be void, and B. shall execute a bill of sale of the machine, creates a bailment only, and if A. sells the machine to a third person, B. may immediately replevy it, though the three months have not expired: *Dunlap v. Gleason*, 16 Mich.

BILLS AND NOTES.

Blank Indorsement by several—Parol Evidence as to Special Arrangement between Parties.—A blank indorsement of a negotiable promissory note is, as between the immediate parties thereto, only *prima facie* evidence of the contract implied by law; and it is competent to prove by parol evidence, the agreement which was in fact made at the time of the indorsement: *Smith v. Morrill*, 54 Me.

As to third persons without notice of any other contract, the one implied by law is conclusive: *Id.*

In an action by one indorser who had paid the note, against another for contribution, it is competent for the plaintiff to prove that it was "verbally agreed by all the indorsers, previous to indorsing, that their indorsements should be joint and not several; and that, in the event of liability thereon, and the payment thereof by either, of the whole amount of the note, each should pay to the one thus paying, his equal proportion of the amount thus paid, as joint and not as several indorsers:" *Id.*

Proof of such agreement would make the indorsers, as between themselves, co-sureties, and payment of the whole debt by one, would authorize the maintenance of suits by the one so paying, against each of the others for their proportional parts, upon counts for money paid for their use: *Id.*

CONSTITUTIONAL LAW.

Legislative Allowance of Private Claims.—The constitutional provision that the legislature shall not audit and allow any private claim, extends to claims against townships and counties as well as those against the state. *Held*, therefore, that a legislative act declaring a note given by individuals for bounty moneys to be a lawful charge against the township, and directing the supervisor to levy a tax for its payment, was inoperative: *People v. Shennan*, 16 Mich.

COUNTER CLAIM.

A counter claim or defence of an equitable nature, may be interposed, although the claim or demand mentioned in the complaint is purely of a common law nature, or for the recovery of money only: *The Hicksville, &c., Railroad Co. v. The Long Island Railroad Co.*, 48 Barb.

If the claim and counter claim arose out of the same transaction or contract, there is no necessity for a cross-action by the defendant: *Id.*

DEBTOR AND CREDITOR.

Fraudulent Conveyance to Debtor's Wife—Deposition of Wife.—In a suit in equity by a creditor against his debtor and the debtor's wife, seeking to reach and apply in payment of the debt property of the debtor fraudulently conveyed to her with intent to defraud his creditors,

and so held by her that it cannot be come at to be attached or taken on execution in a suit at law against the debtor, the court will not restrain the plaintiff from taking the deposition of the debtor's wife, touching the matters alleged in the bill against her, after the process has been duly served upon her, although no service has been made upon her husband, and he is out of the country, and the plaintiff has not established his debt against her husband by any judgment: *Crompton v. Anthony*, 13 Allen.

DECEDENTS' ESTATE.

Ancillary Administration in another State—Conclusiveness of Decree in another State.—If ancillary administration is taken out in another state upon the estate there of a deceased citizen of Massachusetts, a decree of the judge of probate there, allowing a claim of the administrator against the estate, and finding a balance due to him over and above the assets there coming to his hands, is not conclusive here, and will not entitle the administrator to charge for such balance here: *Ela v. Edwards*, 13 Allen.

DEED.

Reforming.—The defendant agreed to sell and convey to the plaintiffs a lot of land 26 feet 6 inches in width, being in depth on C. street 120 feet, "to and including the stable on the rear of the premises." The defendant executed and delivered a deed for the lot, describing it as 120 feet in depth, but making no mention of the stable. There was a stable on the rear of the premises, built by a former owner, situated partly upon the said lot, but 11 feet and 10 inches thereof were located on the rear of another lot belonging to the defendant. Both parties acted in the erroneous belief that the 120 feet so conveyed included the stable, and neither knew that any portion of it was located upon another lot. *Held*, that this was not a case for the equitable interposition of the court to reform the deed, so as to make it conform, as to the dimensions of the premises, to the previous agreement between the parties: *White v. Williams*, 48 Barb.

A court of equity never grants that relief except when the mistake is very plain, and operates contrary to the intention of the parties. Per CLERKE, J.: *Id.*

EVIDENCE.

Estoppel—Attorney—Deposition of Deceased Witness.—A party is not estopped from explaining how he understood the oath he took on signing a bill in chancery which is afterwards read in evidence against him: *Whitcher v. Morey*, 39 Vt.

It appearing that a law partner of the master who took a deposition, acted, at the taking, as counsel on behalf of one of the parties, the court will not, in absence of proof, presume that their partnership extended to matters of this nature: *Id.*

Testimony given on a former trial by a witness, since deceased, may be reproduced from minutes which were then taken, and which are proven to have been "full and taken with substantial correctness:" *Id.*

If the original minutes are shown to be lost, a copy of them, proven to be a correct transcript, may be read: *Id.*

It is not important that the person who swears to the minutes should profess to testify from recollection of the testimony, or be able to so refresh his memory by reading the minutes as to recall the testimony to his mind. If he can swear that his minutes of the evidence given by the deceased witness are full and substantially correct, they may be read to the jury: *Id.*

The party proposed to read to the jury as evidence a copy taken by another person of the judge's notes, of the testimony of one C., as given upon a former trial, C. having deceased; and, at the same time, proposed to prove that the original minutes were lost and the copy was correct, and by the deposition of the judge that the original minutes were full and taken with substantial correctness. *Held*, that upon the proof offered the party was entitled to read the copy to the jury: *Id.*

Of Party against Representative of Deceased Party.—The statute which makes a party to civil proceedings a witness generally, except that where the opposite party is representative of a deceased person, he shall not testify to facts which must have been equally within the knowledge of the deceased, does not make the competency to testify depend upon the relative degree of knowledge of the deceased and the witness, but is meant to altogether exclude the evidence where the deceased, if living, could have spoken to the same transaction: *Kimball v. Kimball*, 16 Mich.

FRAUDS, STATUTE OF.

Deed—License—Verbal Contract to convey Land.—A verbal contract for the purchase and future conveyance of real estate, followed by a payment and securing of the price as agreed is not of itself sufficient to authorize or license the proposed purchaser to enter upon the land, even after the time has elapsed within which the owner of the land was to give his deed: *Whitcher, Adm'r., v. Morey*, 39 Vt.

A verbal contract for the future conveyance of land, though followed by payment of the purchase-money, is, until the deed is given, inoperative to pass any interest, legal or equitable, in the land or right to enter upon it, and, unconnected with other facts, is not even evidence of a permission to enter upon the land: *Id.*

C. bargained verbally with M. for a lot of woodland, C. to deliver part of the purchase-money, and his notes and a mortgage for the rest to a third person at a specified time, and M. to leave a deed with the same person to be taken by C. at the same time. C. paid and delivered his notes and a mortgage according to agreement. M. left no deed for C., and ultimately refused to convey. The jury finding that M. gave C. no permission to enter upon the land, and he having entered and peeled bark, it is *held*, that the above facts were no warrant to C. to enter upon the land, and the bark he peeled was M.'s property, and could not be held by the plaintiff who bought it of C.: *Id.*

Sale of Goods—Memorandum in Writing—Signature by Stamping.—The acceptance in Massachusetts of a bill of goods which are in a warehouse in New York, with an order on the warehouseman for their delivery without notice to him, is not an acceptance or receipt of the goods, which will take the sale out of the operation of the Statute of Frauds: *Boardman v. Spooner*, 13 Allen.

If on the trial of an action to recover the price of goods sold and delivered the purchaser produces, on notice, the vendor's bill of sale of the goods, bearing the purchaser's name stamped thereon with a press, and there is no evidence to show when or under what circumstances it was so stamped, this is not sufficient proof to authorize the jury to find a note or memorandum in writing of the bargain, made and signed by the purchaser: *Id.*

If by the terms of an oral contract goods sold are subject to the purchaser's approval, a broker's note in writing of the sale which omits that portion of the oral contract is inadmissible to take the case out of the Statute of Frauds; nor, in such case, can the vendor be allowed to prove that by a usage of trade the goods are to be examined within a limited time, and if not examined and objected to within that time the sale is deemed complete: *Id.*

HUSBAND AND WIFE.

Divorce for Cause existing at Marriage.—The statute allowing a divorce on behalf of the wife, where the husband has become an habitual drunkard, will not warrant a decree where the husband, to the knowledge of the wife, was a drunkard at the time of the marriage, and his habits have not materially changed since: *Porrett v. Porrett*, 16 Mich.

INNKEEPER.

Intoxicating Liquor.—An innkeeper has the same rights and privileges, so far as his own family or household is concerned, to furnish them with such food and beverage as he judges fit and proper for their sustenance and refreshment, as any other head of a family, and incurs no penalty thereby, nor by having it in his house when he so furnishes it: *State v. Jones*, 39 Vt.

The respondent was a hotel-keeper, and W. was employed by him four days as a hostler. While so employed the respondent furnished him at the bar with whiskey three times, which he there drank. W. took care of the stables and was up nights, and had been so sitting up on these three occasions when he so drank. *Held*, that this furnishing to W. did not come within the prohibited and penal provisions of the statute: *Id.*

But the gratuitous furnishing of liquor to musicians, on the occasion of dances at his house, though hired by himself, came within the statute: *Id.*

JOINT DEBTORS.

Separate Discharge.—Under the statute of New York which authorizes one of several joint debtors to make a separate settlement with the creditors, which shall not discharge the others except for his proportion of the debt, it is not necessary that the receipt given by the debtor thus settling should refer to the statute, where it sufficiently appears on its face to be given under it: *Holdredge v. Farmers' and Mechanics' Bank*, 16 Mich.

Statute of Limitations—Payment by One.—Where one partner after the dissolution of the partnership gave a writing to the creditors, agreeing that they might compromise with and discharge the other, and he

would still remain liable, and the creditors took compromise notes from the other partner which were afterwards paid, *held*, that such payments must be considered as made only on behalf of the party making them, and could not have the effect to prevent action being barred by the statute as to the other: *Sigler v. Platt*, 16 Mich.

LIBEL.

Complaint—Innuendo.—Where the words used in an alleged libel, *ex necessitate*, expose the plaintiff to public ridicule or reproach, no explanation or application of the language employed is required; but where they are at all susceptible of an innocent construction, a complaint alleging that the publication tends to blacken and injure the reputation of the plaintiff and expose him to public hatred, contempt, and ridicule, cannot be sustained without an *innuendo* explanatory of the ambiguous words: *More v. Bennett*, 48 Barb.

A charge that a *prostitute is under the patronage or protection of the plaintiff* does not necessarily impute moral guilt; and where, in a complaint upon such a charge, there was no allegation that the writer of the alleged libel intended to impute such guilt to the plaintiff; *it was held*, that the complaint was fatally defective in not containing an *innuendo*: *Id.*

Where the words are so ambiguous that they may be understood in an innocent sense, the mere allegation of malicious intention is not sufficient: *Id.*

MANDAMUS.

Return sufficient in Law but false in Fact—When Court will issue Peremptory Writ.—In this state, if, to an alternative writ of *mandamus*, the respondents return a legally sufficient cause, though false in fact, the court will decline to proceed further: *Dane v. Derby et al.*, 54 Me.

If the return be falsified in an action on the case, or by criminal information for a false return, the court will then issue a peremptory writ: *Id.*

Neither the statute of 9 Ann., c. 20, nor any similar statute, has ever been adopted in this state: *Id.*

The respondent cannot demur to the petition and the writ; but, if the writ be defective or do not contain allegations of all such facts as are necessary to show that the prosecutor is legally entitled to the relief prayed for, it may be quashed on motion, or the defects may be taken advantage of in the return: *Id.*

If the original return be sufficient, the filing of an additional one, in the nature of a demurrer, will not affect the sufficiency of the former: *Id.*

The writ must be executed in the form in which it has been issued, or not at all: *Id.*

The granting of a writ of *mandamus* is a matter of discretion, and not of right: *Id.*

The court will not grant a peremptory writ against municipal officers elected for one year only, ordering a new election, because of the fraudulent voting practised at the election at which they were declared to be elected, if such officers have returned a sufficient cause to the alternative writ: *Id.*

NEGLIGENCE.

Injury resulting in Death.—The husband at the common law may maintain an action against one through whose wrongful act an injury is occasioned to the wife, notwithstanding death results before suit brought. But he can only recover the pecuniary damage to himself, in consequence of the injury, up to the time of the death. His anxiety and mental anguish, occasioned by the injury, do not constitute a basis for the recovery of damages: *Hyatt v. Adams*, 16 Mich.

RAILROAD COMPANIES.

Restricting Liability as Carriers.—A railroad company chartered as common carriers have no right to refuse to receive and carry goods except upon a restricted liability, but every one has a right to require his goods to be carried under the common law obligations: *McMillan v. The M. S. and N. I. Railroad Co.*, 16 Mich.

The statute which forbids railroad companies restricting their common law liability as carriers, does not prevent persons transacting business with them from making such contracts as they please by which they relieve the company from some portion of their liabilities: *Id.*

And where a bill of lading is accepted without objection, and property sent under it, with condition exempting the carrier from responsibility for loss by fire, the condition must be presumed to have been assented to by the party for sufficient consideration, and proof that he did not read it is immaterial: *Id.*

Bill of Lading—What it covers.—A bill of lading given at Cincinnati, by which a railroad company promises to deliver goods "at Toledo for Detroit"—the consignee doing business at Detroit—will cover the transportation to Toledo only, and another company receiving the goods at Toledo to transport to Detroit, will receive and carry them under their common law liability, and not under the conditions of the bill of lading: *Id.*

SPECIFIC PERFORMANCE.

Where Vendor cannot make complete Title.—After a contract had been made for the conveyance of a parcel of land, it was discovered that the vendor's deed conveyed to him an undivided two-thirds only. The vendee was willing to take that and pay rateably, but the vendor refused to convey. *Held*, that the vendee was entitled to specific performance to the extent of the two-thirds: *Covell v. Moseley*, 16 Mich.

But held further, that it was error to order the vendee to deliver up possession of the whole land, and to charge him with rent for the whole from the time performance should have been made. The order in these respects should have been no broader than the decree for performance: *Id.*

TRADE-MARKS.

Injunction.—Where the defendant has procured a trade-mark closely resembling one already in use by the plaintiff, and has attached it to a perfume manufactured by him, adopting the same name and style of packages as the latter, with the intention of counterfeiting the plaintiff's trade-mark, as well as imitating the article and style of packages used by him, and of appropriating, through such counterfeit label, the market

obtained for the perfumery of the plaintiff, and in this design he has been to some extent successful, and has thereby injured the plaintiff, it is a proper case for an injunction to restrain the use of the label or trade-mark; notwithstanding the defendant sets up the defence that the plaintiff, in selling his perfume, is attempting to impose upon and defraud the public, if the evidence upon that subject is conflicting: *Smith et al. v. Woodruff*, 48 Barb.

That defence ought to be suggested by the court, whenever the imposition on the part of the plaintiff is flagrant. Thus, where a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease; or where a charlatan avails himself of the prejudice, superstition, or ignorance of some portion of the public to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan. Per LEONARD, J.: *Id.*

VESSEL.

Registry—Permanent and Temporary—Sale.—A vessel cannot have two registers at the same time: *Chadwick v. Baker*, 54 Me.

"Permanent" and "temporary," when applied to the registers of a vessel, do not imply that they are co-existent, but successive: *Id.*

Such a sale of a vessel, in whole or in part, as creates a new owner, renders her former registry inoperative and void: *Id.*

Under Act of Congress of July 29th 1850, a bill of sale of a vessel, whether conditional or absolute, must be recorded in the office from which her last register issued: *Id.*

LIST OF NEW LAW BOOKS RECEIVED BY THE PUBLISHERS OF THE AMERICAN LAW REGISTER.

BOUVIER.—A Law Dictionary, adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union. By JOHN BOUVIER. 12th Ed. revised and greatly enlarged. 2 vols. Royal 8vo. Philadelphia: Geo. W. Childs, 1868. \$12.

ENGLISH COMMON LAW REPORTS.—Reports of Cases in the English Courts of Common Law. Vol. CXV., being Vol. 19 of Common Bench Reports. By JOHN SCOTT. Containing Cases argued and determined in the Courts of Common Pleas and Exchequer Chamber in Trinity Term 1865. Edited, with references to American Decisions, by JAMES PARSONS. Philadelphia: T. & J. W. Johnson & Co. \$4.

MICHIGAN.—Reports of Cases decided in the Supreme Court of Michigan from October 31st 1866 to July 11th 1867. WILLIAM JENNISON, Reporter. Vol. 2, being Vol. 15 of the Series. Detroit: W. A. Throop & Co., 1867.

SCRIBNER.—A Treatise on the Law of Dower. By CHARLES H. SCRIBNER. 2 Vols. 8vo. Philadelphia: T. & J. W. Johnson & Co., 1867. \$15.

THE

AMERICAN LAW REGISTER.

FEBRUARY, 1868.

THE IMPORTANCE OF JUDICIAL ADMINISTRATION TO THE PROTECTION OF THE INNOCENT, THE PUNISHMENT OF THE GUILTY, THE DEFENCE OF PROPERTY AND PERSONAL RIGHTS. AND THE JUST MAINTENANCE OF CONSTITUTIONAL GOVERNMENT. ILLUSTRATIONS DRAWN FROM ENGLISH CONSTITUTIONAL HISTORY AND THE COMMON LAW, AS WELL AS RECENT TRIALS IN WESTMINSTER HALL AND OTHER PORTIONS OF THE UNITED KINGDOM.

THE administration of justice, in all countries, and at all times, is a subject broad and difficult, both in its operation and its influence. It is perhaps more indicative, a truer test, of the real temper and spirit, both of the government and the people of the state or country, than any other one thing. This is especially true in regard to the administration of criminal justice, where the court is called to hold the scale of justice impartially between the state and the accused ; or, what is sometimes more difficult, between the government or different factions or parties, for the time holding the administrative functions of the government, and the people at large. And this difficulty is greatly enhanced where offences against the government are concerned ; especially in monarchical governments or states ; and more so as those monarchies partake more of the absolute or despotic character. It may there well be supposed, that where the judge holds office at the mere will of the sovereign, and is liable at any moment, upon the slightest occasion, or none at all, to be removed

in disgrace, and thus have both the source of present support and future acquisition removed, in such cases it may well be supposed that the judge will almost necessarily merely echo the will or the desire of the sovereign, and that justice will be very little regarded. Hence very little fairness or purity is expected in countries under despotic rule, from the administration of justice, where the will of the sovereign is placed in the scale against the rights, either of individuals or of the people at large. This is a proposition so obvious as to meet no general denial or question. If any case occurs where fairness and firmness are exhibited in the courts of such a country, in opposition to the influence or the interests of the sovereign, it will be the more admired and praised, but none the less regarded as exceptional, and not to be counted upon in the general estimate of consequences and results.

Now this spirit, it must be remembered, is not peculiar to despotic governments, for it is natural and almost necessary that all governments and all parties having for the time the possession of administrative functions, should desire to have the courts favorably inclined towards themselves. And this being so, all governments and all governing parties will study to make and to keep the judicial administration favorable to their own views, and will consequently endeavor to frown down or put down all opposing views in the courts. This will be done in different countries and at different times in ways differing materially from each other; but in all cases with the same purpose of controlling and thus virtually corrupting the purity and independence of the judicial administration. And so far as we have observed, this is none the less true in republics than in monarchies. It is a thing to be expected everywhere alike. And it is not a thing which one can fairly consider as within certain reasonable limits. If we concede the same good faith to others which we all claim for ourselves, we must expect governments and parties, who believe in the soundness or the wisdom of their own policies, to labor to place themselves and their friends and the doctrines and constructions for which they contend upon the high vantage-ground of universal recognition and acceptance. To expect anything less would be to impeach either the good faith, the courage, or the zeal of the parties concerned.

Thus it will occur in more despotic governments, as for centuries in the history of the British monarchy, and even at the

present time in many European states, whose governments are, upon the whole, wisely and beneficially administered, that the judges will be removed or removable at the mere arbitrary will of the sovereign. And equally, in such governments, the sovereigns—as did the British monarchs until the accession of William and Mary, after the Revolution of 1688—will claim and exercise, at will, the power to suspend the operation of any law, written or unwritten, so long as to them shall seem for the interest of the state. These are the usual prerogatives of arbitrary and despotic empires, without which they would cease to be such.

Now, it must be remembered that these defects in governmental, and especially judicial, administrators, are not peculiar to despotic empires or states, and certainly not confined to governments of any particular organization. The short experience of our own happy and prosperous country, whose government is free and popular beyond all former precedent, is not without some lessons of loud admonition in this same direction. The courts, which at first were very generally modelled upon the independent structure and tenure of office of the English courts since the Revolution of 1688, have been gradually receding from that independent position, until, at the present day, there is scarcely one state in the Union where that character extends to all its judicial tribunals. In Massachusetts, for the security as well as the credit of that ancient and honorable commonwealth, the courts and the profession of the law have succeeded in pacifying the politicians and the legislature for the time being with the rather plausible theory that the Supreme Judicial Court, being the highest judicial tribunal in the state, is so embalmed or embedded in the constitution, that its soundness cannot be violated by any profane legislative hands. And this is all which could be saved from legislative demolition. And in order to secure even that last fortress of protection and defence against the rashness and delusions of popular prejudice or passion or fury of any kind, they have been compelled to adopt the suicidal policy of compromise by throwing a tub to the whale, as it has been sometimes called. In order to pacify the insatiable demands of popular ferment and political or legislative aspiration for advancement or progress, sometimes unjustly characterized as improvement, it has been found indispensable, even in this staid old common-

wealth, to concede that all the inferior tribunals whose judges held office by the same permanent tenure, *dum bene se gesserint*; that all those inferior tribunals whose judges numbered ten times as many as those of the Supreme Judicial Court, might be remodelled at the will of the legislature. And this has been literally accomplished within the last fifteen years, for no better object in fact than to change the names of the courts, and thus be enabled to appoint another set of judges, some of whom were younger men than their predecessors, and some were not; some of whom were better qualified to fill the places than those whom they succeeded, and some were not; but all were men in accord with the principles and the policies of the existing government.

Now it must be conceded that in thus volunteering to suggest that there is no difference in principle between the inferior and superior tribunals of a state, and that the Supreme Judicial Court of Massachusetts must put off its time-honored and venerable functions, and ere long consent to lie down in the same legislative sepulchre, thus prepared for all the subordinate tribunals of this noble old commonwealth, we feel not a little guilty of the offence of betraying our fellows, struggling manfully in the same honorable cause for the perpetuity of constitutional government. And we would fain hope there really may be more soundness in this, as it seems to us, rather shadowy distinction between the inviolability of the highest and the subordinate judicial tribunals of this commonwealth, than now occurs to us. But we all know, that in the neighboring state of New Hampshire, where the constitution, in regard to the tenure of the judicial office, is modelled carefully upon that of Massachusetts, the highest court in the state has had the same fate as all its subordinates, and has actually been remodelled by the legislature, not less than three times, within the memory of some now living, with no other purpose or pretence, than to change the name of the court, and thus get rid of the judges. So that in this state, where the tenure of office of the judges is, in terms, the same as in Massachusetts, or in England, *dum bene se gesserint*, the actual security from removal, upon any change in the ascendancy of political parties, is really less than in the neighboring state of Vermont, where the judges are elected annually by the legislature, and where, by immemorial usage, ripened into law, the judges are selected without reference to party, or political bias, and are continued indefinitely by a

formal re-election, unless some cogent reasons exist, demanding some change, in regard to which all parties are agreed. Thus showing very satisfactorily, that the actual facility of change, in popular governments, sometimes actually conduces to the stability of the judiciary, while the opposite not unfrequently begets a popular distrust and uneasiness, not so much on account of existing evils, as of those apprehended in the future.

But having said so much in regard to the manifest disposition among the American states to reduce the tenure of judicial office to a brief term of years, and in most cases to subject it to the test of popular elections, we feel bound to add, that it has not seemed to us, that this could fairly be laid to the account, chiefly, or to any considerable degree, of popular impulses or desires. The great mass of the people are, no doubt, deeply and vitally interested in having and maintaining, permanently, the ablest, most fearless, and independent judiciary, which the wisdom of man can devise. Wherever the appointment and the action of the judiciary has been brought near enough to the people to have them properly appreciate its importance, it has always been found, that a fearless and able judiciary was sufficiently safe in their hands. And although they do not readily volunteer to extend the term of judicial office, they are always content to let it remain where it is. It has always been found, hitherto, that movements in the different states, to limit the term or weaken the tenure of judicial office, have proceeded from those who hoped sometime to obtain the position themselves, or who desired the places as political capital, to distribute among their followers, or else dreaded the opposition or the control of an independent judiciary, as an obstacle to legislative and other reforms, in the municipal administration. With the exception of these three classes, there would never have been any difficulty in maintaining the perfectly independent tenure of judicial office in all those states where it was first adopted. The interests of a permanent judiciary have been betrayed, by political demagogues and time-serving placemen, and not by the people at large.

And, sooner or later, it is very obvious that the American States will have to consider the question of the indispensable necessity of an able and independent judiciary, in order to the proper maintenance of constitutional government. That was first secured after a struggle of many hundreds of years, in the British

Government, at the period of the Revolution of 1688. And from that day to this it has proved the mightiest bulwark of the British constitutional government. We do not here refer, of course, to any written constitution, for, aside from some few ancient charters, the Magna Charta, the Petition of Right, and the Bill of Rights, there is, as every student in the history of British constitutional law must know, no such thing as a written constitution in the British Empire. But it is none the less a constitutional government, and one based upon well-settled and recognised principles, and principles lying at the very foundation of all the American constitutions. There is no guarantee of constitutional freedom in America which is not, as every well-read lawyer knows, extracted from the common law of our British ancestors. And one cannot enter the superior courts in Westminster Hall, or Lincoln's Inn, and not feel that the character and temper, the wisdom and forbearance, of the English judiciary has very much to do with the quiet and good order of this little island. At the very moment of this writing, there is wide-spread evidence of discontent among large masses of people, not only in Ireland, but in England. We have not only Fenianism in Ireland, which is in its demands and pretensions the most absurd and hopeless thing imaginable, as dreamy and unsubstantial as the Entertainments of the Arabian Nights; but at the same time a *bonâ fide* and serious disturbance, and one calling for the exercise of great wisdom and forbearance, not only in the executive government, but in the judiciary; not only this, but there is the serious disturbance at Manchester, the actual assassination of the police in open day, and the attempted or threatened assassination of the police in other cities; the conflicts and repeated murders growing out of trades unions and labor strikes, and the disaffection existing in Devonshire and Oxford, and possibly in other portions of the island, in regard to low wages and the high price of bread. All this, and much else, which might be fairly named as indicative of discontent, more or less serious or extensive, might well be supposed to demand the wisdom and the energy of the ablest and wisest administration, both civil and judicial.

But all this, and ten times more, if it should occur, will scarcely produce a ripple upon the surface of the civil administration. Not that there are not some discontented spirits. There will always be men enough, in all states, and under all social or poli-

tical organizations, who would be glad to secure a redistribution of property; and there will be found, in all free governments, some men, in the better conditions of life, who have no desire on their own account to effect any such redistribution of estates, but who will, either from over-sympathy with the sufferings and distress of the poorer classes, and from not sufficiently reflecting upon the incurable nature of these difficulties; or else from want of comprehension, or indifference to consequences, or, what is still more reckless and desperate, from the desire of popular favor and influence, will give more or less countenance to these impracticable demands. We have had experience of this, from leading men, both in Parliament and in Congress, within the last twelve months—and from men of high standing and unquestionable patriotism, in both countries, in the advocacy of what, in plain English, really amounts to a redistribution of property—if it has any sensible meaning.

But, amid all this, and any amount of ordinary lawlessness and disturbance in this great Babel of cities, the largest and almost the wickedest, and really the least arbitrarily governed of any great city in the world, with the hundred other cities and large towns in the little island of Great Britain, scarcely more than five hundred miles in extent, what could be accomplished, with such universal freedom, and such unquestionable exemption from all arbitrary exercise of power, either by the general executive officers or the police of the towns and cities, except by a judicial administration, above all possible doubt or question; and one which the people felt to be their best friend and surest defence? What security exists for rights of property or person except in the judiciary? The legislature, in all times of disturbance, will be the first to propose the concession of part which is demanded, and thus by degrees yield the whole.

In a short visit to the courts at Westminster Hall, for two days in succession, this fact was deeply impressed upon us. We there saw, indeed, men of ordinary human infirmity, with passions and prejudices no doubt such as fall to the common lot, sitting in their ancient places, which had come down from the creation of the *Aula Regis*, dating back almost to the period of the Norman conquest; but men who felt the support of the prestige and the traditions of eight hundred years to back them; men who had all their lives witnessed the field of Runnymede, where

the Magna Charta of English liberty was signed and sealed by King John and the English barons ; who had looked upon, and read, and pondered, the original instrument, for fifty years ; who knew every word of it, and all its commentaries and amendments by heart ; and, above all, men who had imbibed, with their earliest mental culture, the sense of the soundness of British law, and the rights of British subjects ; a thing to earn and settle which had cost centuries of toil, and treasure and blood too ; upon which no price could be placed by any man not base enough to become a slave himself.

With such men for judges, holding office beyond the limit of all earthly control, unless forfeited by crime, which no honest man ever takes into any account, in estimating the security of his possessions, what temptation was there to know any man's person in judgment, or to feel any interest, or influence, beyond that of simple justice ? It is impossible to witness an argument before any of the Courts in banc, in Westminster Hall, and not feel that the judges, the counsel on both sides, and the parties, if present, which seldom is the case, as well as the bystanders, who are often very numerous, are all striving, consciously and quietly, towards one result, to find out, in the shortest way and time, the exact truth and justice of the case. So that, if the presiding judge, or, what is often the case, all the judges in succession, interpose ever so formidable objections, there is no fluttering among the counsel at meeting unexpected difficulties, and no feeling of disappointment among the judges at having objections satisfactorily and conclusively answered. There seems to be no pride of opinion among the judges, no unwillingness to yield a first impression or intimation, but rather, on the contrary, a feeling of satisfaction, if that were wrong, to have it corrected.

In short, one cannot spend an hour in one of these courts, and not feel that the courts are far more the courts of the people than of any other interest. Not that the interests of influential parties are any less regarded or respected than those of inferior standing ; but from the natural presumption, that parties of means and position will be likely to be more carefully investigated and thoroughly argued, than those who are less expensively represented, it will always become the duty of upright and impartial judges, to look carefully to the protection of the rights and interests of those who have no one else to look after them. This was

wonderfully illustrated in the late trials, under special commission, both at Manchester and in Dublin. In both these cases the accused were arraigned for alleged crimes aimed most directly at the quiet and good order of society, in one case a treasonable conspiracy against the government, extending through a very considerable number of disaffected persons, and in the other, the deliberate assassination of one of the police in open day, and in cool blood, for the avowed purpose of rescuing a prisoner in acknowledged lawful custody! But in all the trials, before both these commissions, the deliberation and watchfulness of the judges, to reach the exact truth in all the cases, was so marked and undisputed, that no prisoner was heard to utter the least complaint, in regard to the fairness and justice of his trial. And in the case of those prisoners who chose not to be defended by counsel, the judges literally performed the constructive duty assigned by the common law of supplying the counsel for the prisoners, in making repeated suggestions to the prisoner to make inquiry favoring his defence. He abstained from such as seemed tending in the opposite direction. And then the summing up of the judges, in all these cases, was so entirely fair and full, in bringing out all the just grounds of defence on the part of the prisoners, that it was well characterized by some of the journals, as "a summing up for an acquittal." And still there was no attempt to impeach, or bring in question, on the part of any one, the entire propriety of this watchfulness of the judges to secure an impartial trial for all the prisoners. It seems to be comprehended here, that the only sure way to convict a guilty man before a jury, is to give him all possible chance of acquittal.

And during the present week, in the Court of Common Pleas, before Lord Chief Justice BOVILL and his associates, the hearing of a motion on the part of the somewhat notorious Miss Fray was well calculated to test the patience and forbearance of the English Bench in regard to troublesome suitors who choose to urge their own claims personally before the court, and thus verify the maxim in regard to parties who become their own counsel. This lady had been long in controversy before the court, all the time conducting her own case, until she was fairly thrown in the cause, and judgment was irrevocably given against her; when, instead of paying the same at once, she delayed until the *capias ad satisfaciendum* was placed in the hands of the sheriff's officer and she

committed to prison, and then tendered the amount of the payment and less fees than were due to the solicitors. They naturally demanded the entire sum due, as every lawyer understands was their right. But Miss Fray, knowing nothing of the law on this point, which had been settled for fifty years, chose to argue the matter *de novo* as *res integra*, and on a motion for a rule to strike the attorney's name off the roll, and was very patiently heard to the end. And then, because the court could not adopt her view, threatened the Lord Chief Justice to bring the case before the King's Bench in error. All which was received with the utmost quiet and equanimity by his lordship, without the slightest attempt to be witty at the expense of the good lady, or once looking at the bar over his shoulder to learn whether they commiserated his melancholy condition.¹ And the same, and more,

¹ The Times report of the case, although omitting the *finale*, may be interesting:—

After several practice motions had been disposed of, Miss Fray rose to make another motion in

FRAY v. OVENS.

In this case, which was an action to obtain possession of some documents, brought by Miss Fray, the defendant had a verdict, and the taxed costs against Miss Fray amounted to 24*l.* 8*s.* 8*d.* The attorney's bill not being paid, a writ of *capias ad satisfaciendum* was issued against her on the judgment, and she was taken in execution by the sheriff's officers, and complained of many indignities having been put upon her by the officers and others. She moved on affidavits to strike Mr. Sadleir, the attorney for the defendant in the action, off the rolls of attorneys, on the ground that he had conspired with others to use the process of the court oppressively to injure her, and had refused to accept a tender of the amount of the bill, and 1*l.* 5*s.*, sheriff's poundage, which she contended was all that could be claimed, whereby she had been subjected to the indignities of which she complained, had been kept some time in prison, and had been put to expense. It appeared, on going through the figures which the sheriff's officers were entitled to for execution and poundage, that the total amount of the costs and execution was 27*l.* 0*s.* 2*d.* On this appearing, in the course of a long and rambling statement,

Mr. Justice WILLES said he did not see that Mr. Sadleir or the sheriff's officers were wrong in not accepting the tender she had made and refusing her discharge. She had not tendered what was due. It appeared to him, therefore, that no case was made out for the interference of the court. Miss Fray was mistaken in supposing that the court had power to grant a rule to strike an attorney off the roll on general statements. There must be some specific charge made out against the attorney as an officer of the court before the court could interfere. Taking the affidavits in the most favorable sense for Miss Fray's application, the tender was less than the amount payable; the court could not, therefore, grant the rule to

might be said of the forbearing manner in which the somewhat famous Mrs. Yelverton was treated by the House of Lords a few months since in arguing an appeal in her own favor brought from the decree of the Court of Sessions in Scotland. Lord CRANWORTH, who presided at the trial in the absence of the Lord Chancellor CHELMSFORD, manifested a degree of indulgence almost calculated to encourage irregularity, not to use any more expressive language, which would be, perhaps, fairly justified by the wonderful pertinacity and want of accommodation manifested by the good lady during the trial.

We have extended this paper further than we intended, but not further than seemed needful to illustrate our point, that the more truly independent the judges are made, the more securely will the courts become an asylum and a defence for the innocent, and the more willingly will the people acquiesce in the conviction and punishment of the guilty. And we desired, also, to bring prominently before the profession and the public the vital truth, that the only reliable security for all property or personal rights and interests rests in an impartial and fearless administration of public and private justice; and that the just principles of free constitutional government, of which we are all so justly proud in America, cannot stand secure for all time upon any other basis.

I. F. R.

LONDON, November 10th, 1867.

strike the attorney off the roll for refusing to take the proper amount tendered under a *ca. sa.* It would be a gross injustice if the rule were granted.

Mr. Justice BYLES and Mr. Justice KEATING were of the same opinion.

Miss Fray wished to be allowed to bring forward further affidavits which would strengthen her case.

This the Court refused to allow.

The CHIEF JUSTICE said he had refrained from interfering or from expressing an opinion in the case because Miss Fray had stated the other day that he ought not to do so, as he had been counsel for fourteen years for the Earl of Zetland. It was unnecessary for him to say that the fact of his having been counsel for the Earl of Zetland in other cases had not had the slightest influence on him in this application; but he felt it right to state that the only feeling on his mind was one of pity and compassion for Miss Fray, and that he regretted much to hear the other day that she was suffering from some disease of the brain.

Miss Fray.—Oh, not now, my lord; I am quite well.

Rule refused.

RECENT AMERICAN DECISIONS.

*United States District Court, Eastern District of New York,
In Bankruptcy.*

IN THE MATTER OF FRANCIS SCHNEPF, A BANKRUPT.

The lien of a levy made by a judgment-creditor under an execution from a state court, is not disturbed by the debtor's filing a petition in bankruptcy.

The Court of Bankruptcy, in such case, may either allow the creditor to proceed with the execution, or may enjoin him and direct the assignee to take possession and sell the goods, with leave to the creditor to apply for an order directing the payment of his judgment out of the proceeds.

THIS was a motion to dissolve an injunction restraining creditors from proceeding to sell personal property levied upon prior to commencement of proceedings in bankruptcy. The bankrupt filed his papers on the 9th of October, and was declared a bankrupt, and procured an injunction prohibiting creditors, Cammeyer & Mason, from enforcing a levy, which the sheriff had made upon Schnepf's property under a judgment against him which they had obtained in a state court. The affidavits on behalf of the bankrupt, showed that he had prepared his papers to take the benefit of the act in September; that the summons in the suit of Cammeyer & Mason was served on him on September 17th, that after that service he sent to them showing them the state of his affairs, and offering them a compromise of their debt, at forty cents on the dollar, telling them that he should go into bankruptcy, if they did not take it; then on the 8th of October, he sent again to them, and they requested till the next day to consider it, and gave him to understand that they would not proceed in their suit in the mean time, but on that afternoon entered judgment against him by default, and issued execution, on which the sheriff made the levy that night, and he filed his papers the next morning.

Daly, for motion.

Knowlton & Baker, contra.

The opinion of the court was delivered by

BENEDICT, J.—This is a motion in behalf of a judgment-creditor of a bankrupt, to dissolve an injunction heretofore issued by this court, restraining him from proceeding to sell, under an execution, certain personal property levied upon prior to the filing

of the petition in bankruptcy. The motion is opposed by the bankrupt on the ground that the judgment under which the judgment-creditor seeks to proceed, was obtained in fraud of the Bankrupt Act, and by the assignee in bankruptcy, on the ground that the title of the property in question has vested in him as an officer of the court, and no person can be permitted to dispose of or interfere with it except under the order of the Bankrupt Court, to which the property has been transferred by operation of law.

The facts attending the judgment are so fully spread out in the papers before me, and are so simple in their character, that I can without injustice dispose of the question as to the validity of the judgment on the affidavits alone. Upon that question I should gladly hold in favor of the bankrupt if I could do so, as I by no means approve of the manner in which the judgment was obtained, but I do not see how the judgment can be held fraudulent upon the facts. It was obtained in the regular course of judicial proceedings instituted adversely to the debtor, and without collusion. It was entered for an amount admitted to be justly due, and the entry was made as it was, not with the assent of the debtor, but in spite of him. It is in law a valid judgment obtained without fraud or collusion, and can in no proper sense be said to have been procured by the bankrupt with a view to give a preference. This being so, the judgment-creditor, by his levy made prior to the filing of the bankrupt's petition, acquired a security for his debt in the property levied on.

The next question arising is, whether such a security is invalidated by the provisions of the Bankrupt Act, and upon this question I have heretofore had occasion to express an opinion which I see no reason to modify. It seems to me that such a security is preserved, and entitled to be protected upon general principles of law, and that the general scope of the Bankrupt Act indicates that such was the intention of the framers of the act: *Parker v. Muggridge*, 2 Story, p. 343.

The remaining question then is, as to the manner in which this right of the judgment-creditor shall be protected. Two methods are open, by either of which the debt will be secured: one is to allow him to proceed to sell the property at sheriff's sale, in which case, as the affidavits show, there will be little or no surplus for the other creditors; the other to direct the assignee in bankruptcy to take possession of and sell the property at private sale, in

which case, as also appears by the affidavits, a sum can be realized not only sufficient to pay the judgment, but to leave a considerable sum for the other creditors. As between these two methods upon such a state of facts, it cannot be doubted that it is the duty of the Bankrupt Court,—charged as it is with the interests of all the creditors,—to prevent the sacrifice of this property by a sheriff's sale, and direct a sale by the assignee, provided the power so to do has been conferred by the act.

A discussion of this question of the power of the court in the premises is rendered unnecessary in this case, inasmuch as the power is conceded to exist by the judgment-creditor, and no objection is made to a disposal of the property by the assignee instead of the sheriff. I postpone, therefore, the discussion of that point until a case shall arise where it is argued, with the remark that such a power seems necessary to a proper administration of the Bankrupt Law, and that it would seem to be fairly included in the power conferred by the act to collect all the assets of the bankrupt, to ascertain and liquidate all liens or other specific claims thereon—to adjust priorities, and marshal and dispose of the different funds and assets, so as to secure the rights of all persons, and the due distribution of the assets among all the creditors.

The motion to dissolve the injunction will therefore be denied, and an order entered directing the assignee to take possession of the property levied upon and sell the same without delay and to the best advantage, with liberty to the judgment-creditors, immediately upon such sale, to apply for an order directing the payments of their judgment out of the proceeds of such sale.

One of the most interesting questions arising under the Bankrupt Law, is as to the power of the Bankruptcy Court to interfere with a judgment which has been obtained by collusion against a party prior to his filing a petition in bankruptcy, where there has been an execution issued and levy made. Ought the Bankruptcy Court to refer the matter back to the original forum? It has been held by some bankruptcy courts, that if a final judgment is regular these courts cannot interfere. Suppose fraud is shown in obtaining it, can the court then give redress? or must the assignee seek his

remedy in the other forum? In the case of *Hugh Campbell, a Bankrupt*, ante p. 100 (Western District of Pennsylvania), which was upon a creditor's petition to declare C. a bankrupt, valid judgments had been obtained and entered in the Court of Common Pleas prior to the Bankrupt Law. A sale had been made, and the sheriff had brought the proceeds in court. An injunction issued restraining plaintiff from proceeding further, with leave to move to dissolve. McCANDLESS, J., concluded, "after much reflection," that the court had not the right to sustain the injunction. It was contended that

Congress, by implication, conferred on the District Courts authority to suspend proceedings elsewhere, and to command obedience to their mandates exclusive of other jurisdictions. "By virtue of the 5th clause of the 8th section of the 1st article of the Constitution of the United States (says the Court), granting the power to establish uniform laws on the subject of bankruptcy throughout the United States, Congress had the right to do, but they have not done so." In the *Matter of Burns*, a voluntary Bankrupt (in the same court), ante, p. 105, a petition was filed 31st July 1867. The First National Bank, a creditor of the firm of which B. was partner, on the 18th July 1867, obtained judgment, and made levy prior to the commencement of bankruptcy proceedings. It was alleged that the note on which this judgment was obtained was given under promise not to sue a writ of execution, but to be held as security to afford the firm an opportunity to make some arrangement with their creditors. In violation of this agreement as alleged, and in fraud of the 38th section, judgment was taken and levy made. But before the date fixed by the sheriff to sell, the court granted an injunction staying the sheriff from proceeding, directing him to deliver the property to assignee in bankruptcy. Counsel for the bankrupt argued, that the court was bound to interfere by injunction because the judgment was *not valid*. McCANDLESS, J., said: "If it is fraudulent or void under the bankrupt law it is the province of the assignee in bankruptcy, who stands in the attitude of a defendant, to see in *that* forum that no injustice is done to the general creditors," and referred it to the state court. Thus the judge held, even if the judgment was obtained by fraud on the act, that the bankruptcy court *could not interfere*, and the assignee must seek his remedy in the state court. Is this opinion the true rule, and in such a case

cannot the bankruptcy court give a remedy? Does not fraud vitiate all contracts and proceedings, and if a judgment be obtained through fraud on the bankrupt law—being void *ab initio*—must the bankruptcy court send the assignee to the other forum? Should not this court examine into the question, and thus save circuity of action and embarrassment? In the case of *Irving v. Hughes*, argued before GRIER and CADWALADER, JJ., in the Eastern District of Pennsylvania, post p. 209, it was held, that bankruptcy courts have no supervisory jurisdictions over proceedings of the state courts: Act March 2d 1793. But the litigant in it may be restrained from doing what would frustrate or directly impede the jurisdiction expressly conferred by the bankruptcy act: 7 Howard 612; 4 Cranch 179. The bankruptcy court ought to have the power to act in such cases. And have they not? The judge, in *Campbell's Case*, says: "The bankrupt law confers no authority on this court to restrain proceedings therein (*i. e.*, in state courts) by injunction or other process." The court, in the above case of *Francis Schnepf*, did not go so far, nor do we believe any other court has yet taken so broad grounds. But in *Schnepf's Case* the court says: "I should gladly hold in favor of the bankrupt if I could do so, as I by no means approve of the manner in which the judgment was obtained, but I do not see how the judgment can be held fraudulent upon the facts—it was obtained in the regular course of judicial proceedings instituted adversely to the debtor and without collusion." From this ruling it would seem, that had *fraud* been clearly shown, as it was attempted to be shown, the court would doubtless have compelled the judgment-creditor to take *pro rata* with the other creditors. That would seem the wiser course, and in accordance with the spirit of the law.

Thus, in the case of *Metzler and Cowperthwaite* (in the Southern District of New York), reported in 6 Int. Rev. Record, p. 74, BLATCHFORD, J., refused to dissolve an injunction restraining judgment-creditors from proceeding on an execution and levy obtained previous to commencement of bankruptcy proceedings. In the case of *Henry Bernstein* (same court), 6 Int. Rev. Record 222, where there was nothing shown to impeach the *bona fides* of the judgment execution and levy, the sheriff having sold the property levied on, it was held the sheriff could apply the proceeds of the property sold towards the discharge of the amount which he is required by the execution to make, and pay the overplus to the assignee, if one, and, if none, then to the clerk of bankruptcy court, to the credit of the bankrupt. But if there had been something shown to impeach the *bona fides*, the court would have ruled otherwise. No lien by a creditor (see § 20), gives him a preference except a lien by mortgage. In the matter of *Benjamin F. Metcalf and Samuel Duncan*, bankrupts, reported in vol. 6 Int. Rev. Record, p. 223, in the Eastern District of New York, which arose upon a petition filed by Buckman, for relief from an injunction issued by the court restraining all proceedings in a cause pending in the Court of Appeals of the state of New York, wherein the petitioner was plaintiff, and one of the bankrupts defendant, the case was tried and judgment given for plaintiff, which was appealed from. One of the securities upon appeal, having become insolvent, the plaintiff, after the commencement of bankruptcy proceedings, gave notice of motion to compel the bankrupt to furnish new security or abandon his appeal, whereupon the bankrupt obtained from this court, in which his petition in bankruptcy had been filed, an injunction staying all proceedings, which injunction the plain-

tiff in that cause moved to have dismissed. BENEDICT, J., in delivering the opinion of the court, after referring to sec. 21 of the bankrupt act, and stating its object to be to prevent a race of diligence between creditors, and to protect the bankrupt from being harassed with suits pending the question of discharge, says: "My opinion, therefore, is, that it is the clear duty of this court to maintain this injunction heretofore granted against the petitioners until the bankrupt shall have had a reasonable time to obtain his discharge. What effect the discharge, if obtained, will have upon the proceedings pending in the state court I do not undertake to decide. The motion must be denied."

The opinion in this case follows in the wake of the cases of *Bernstein*, *Schnepf*, *Metzler* and *Cowperthwaite*, and others cited, but in effect opposed to the decisions in *Campbell's* and *Burns'* cases.

In the case of *Russel v. Cheatam*, 8 S. & M. Rep. 703, it is held, that the state courts must be governed by the construction given to the Bankrupt Act by the Courts of the United States.

And by the case, *Clarke v. Rist*, 4 McLean 494, it was held, where creditors are proceeding in a state court to enforce liens on the property of the bankrupt, the Circuit Court would take jurisdiction of a bill for injunction on them *if fraud be alleged*.

The ruling in the cases of *Campbell* and *Burns* seems contrary to the provisions of the 1st section of the Bankrupt Law, which provides among other things, that "the jurisdiction of the court shall extend to all cases and controversies arising between the bankrupt and any creditors, who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens, and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all

parties, and to all acts, matters and things to be done under and in virtue of the bankruptcy." Also (sect. 15) provides, that the assignee shall demand and receive from all persons holding the same the estate assigned or intended to be assigned. Can it be contended in view of these express provisions that goods levied on, after a judgment has been obtained by fraud, are not one of the estates intended to be assigned? Statutes are to be construed liberally in furtherance of the general object, both with reference to the act itself and the remedy: *Beekman v. Wilson*, 9 Met. 438.

We conceive the intent and genius of the Bankrupt Law to be, to give an equitable and just division—*ex æquo et bono*—of the bankrupt's property to all interested that they take a *pro rata* share. Hence, the law provides (sect. 39) against all schemes for giving preference by or against a person who is in fact insolvent, and makes any such attempt an act of bankruptcy. Cases will soon arise which will present the question, whether in a case where judgments are obtained by fraud the Bankruptcy Court can interfere squarely before them. J. F. B.¹

Circuit Court of the United States. Eastern District of Pennsylvania. In Equity. October Session, 1867.

JAMES IRVING v. THOMAS HUGHES.

In a case of involuntary bankruptcy in which the debtor, being insolvent, or, having insolvency in contemplation, and intending to give a preference, or to defeat or delay the operation of the Bankrupt Law, has, within six months before the commencement of the proceedings in bankruptcy, given to a creditor who had reasonable cause to believe that a fraud on this law was intended, or that the debtor was insolvent, a warrant of attorney under which judgment has been confessed in a state court, and an execution has been levied upon his stock in trade, which has not as yet been sold under it, the present Bankrupt Law gives to the courts of the United States for the proper judicial district, jurisdiction to prohibit such creditor, by injunction, from proceeding further under such execution.

The District Court, instead of issuing such an injunction under the summary jurisdiction in bankruptcy, may refuse to consider the subject unless under a distinct auxiliary proceeding in equity against such a creditor. The bill at the suit of the petitioning or any intervening creditor, may then be prosecuted in the Circuit Court on behalf of the general body of creditors, until the assignment in bankruptcy, after which the assignee may be substituted or added as a complainant; and if the proceedings in bankruptcy are duly prosecuted, a preliminary injunction issued by the Circuit Court may, in a proper case, be continued after answer, under such conditions as will preserve the priority of the creditor thus restrained if the lien of his execution should ultimately be established.

THIS was a bill in equity, under sect. 2 of the Bankrupt Act,

¹ In giving place to the foregoing note by an esteemed contributor, we desire to repeat that we do not commit the Law Register to any particular line of opinion, but hold its pages open to any well-stated view of any professional topic.—ED. A. L. R.

for an injunction in aid of proceedings in bankruptcy. The plaintiff was the petitioning creditor in the Court of Bankruptcy, to have one ——— declared an involuntary bankrupt. The defendant was also a creditor of ———, and had entered a judgment against the latter in a state court, on a warrant of attorney, given within six months of the commencement of the proceedings in bankruptcy, upon which judgment an execution had been issued and a levy made. This was a bill to restrain him from proceeding further on his judgment. A preliminary injunction was granted, whereupon the defendant filed his answer, setting forth the facts, and moved to dissolve the injunction.¹

Longstreth and Townsend, for the motion.—The court has no jurisdiction. The 2d section of the Bankrupt Act, which confers jurisdiction on the Circuit Court, excepts cases for which special provision is otherwise made, and the case is within the exception because the 40th section gives a summary jurisdiction to the District Court in bankruptcy to restrain, by injunction, the debtor, and any other person, from making any transfer or dispo-

¹ In several cases of involuntary bankruptcy in this district, the alleged act of bankruptcy has been that, under a warrant of attorney, given within six months by the alleged bankrupt, judgment against him has been entered at the suit of a favored creditor in the state court and an execution levied upon the stock in trade of the defendant, who (it is alleged) gave the warrant, or procured the levy to be made, when he, with such plaintiff's knowledge, was insolvent, or contemplated insolvency, and that the intent was to give a preference, or to defeat or delay the operation of the Bankrupt Law; this alternative intent being usually, in the proper language of pleading, alleged conjunctively, as a twofold intent.

In these cases, unless the property levied on has been already sold, under the execution, the petitioning creditor, upon obtaining the preliminary order on the debtor to show cause against the adjudication of bankruptcy, has usually asked of the District Court an injunction prohibiting the judgment-creditor from proceeding further under his execution in the state court. The District Court has uniformly refused to grant such a preliminary injunction without a previous citation of the execution-creditor; and, upon the return of such citation, has given to him the option of requiring the petitioning-creditor to proceed by bill in the Circuit Court under the auxiliary jurisdiction conferred as above by the Bankrupt Law. When the urgency has been too great to abide the return of a citation, the District Court has required the petitioning-creditor to proceed, at all events, in the first instance, by bill in the Circuit Court. Preliminary injunctions have been granted upon such bills, with a saving to the party enjoined of his lien if its priority should afterwards be established either under the proceedings in bankruptcy, or in the suit in equity. The court has remarked that after the appointment of an assignee in bankruptcy, the proceeding in equity could not be continued except under a supplemental bill at his suit.

sition of the debtor's property, and from any interference with it. Nor is there any jurisdiction under section 40, as that section applies only to the period anterior to the return of the order to show cause. They also cited the cases of *Campbell* and *Burns*, in the Western District of Pennsylvania, Am. Law Reg., Dec. 1867, *ante*, pp. 100, 105.

Speakman, for the plaintiff, against the motion.—The summary jurisdiction specially conferred by the 40th section is not co-extensive with the exigency of the cases in which an injunction may be necessary; this summary jurisdiction is perhaps limited to cases of restraint of the alleged bankrupt's own agents or other persons in immediate privity or association with him, and is, at all events, in terms, expressly limited to the interval between the issuing and the return of the order to show cause. It is suggested that formerly, under the Bankrupt Law of 1841, a question had arisen whether the prohibition of the Act of 2d March 1793, § 5, to grant an injunction without previous notice, applied to a proceeding in equity in aid of the jurisdiction in bankruptcy, and that the 40th section of the present Bankrupt Law, in the enactment now in question, resolves this doubt by allowing the injunction without previous notice, for this interval of time between the issuing and the return of the order to show cause.

The Court, GRIER and CADWALADER, JJ., were of opinion they had jurisdiction, saying: The cases in bankruptcy in the Western District are inapplicable. The language used in them should be understood according to their subject-matter. The case principally relied on was one of voluntary bankruptcy involving a question which the court of the state was considered by the judge fully competent to decide. Here, on the contrary, the question is not fully cognisable under the jurisprudence or legislation of the state. The courts of the state certainly cannot, in all cases, enforce the adversary rights of the general creditors under an involuntary bankruptcy. The jurisdiction of the courts of the United States does not here depend upon the provision of the 40th section of the present Bankrupt Law. This provision does indeed impliedly *recognise* the jurisdiction. But the previous enactments of other sections *confer* it. The provision of the 40th section applies only to the primary stage of the proceed-

ings. In that stage, it dispenses with conditions and formalities which must otherwise have been fulfilled and observed. As against what parties other than the alleged bankrupt, it has thus dispensed with them, need not be considered, because the present proceedings in this court, if in proper form, cannot be irregular. Under the former English jurisdiction in bankruptcy, the chancellor would refuse to proceed otherwise than upon a bill, where he thought proper thus to afford an opportunity to appeal from his decision. The present Bankrupt Law of the United States gives to this court, in addition to its revisory jurisdiction, an auxiliary jurisdiction which may sometimes be so exercised as to secure the benefit of an appeal from the District Court without the delay and expense.

These courts have no supervisory jurisdiction over proceedings of the state courts. In each of the cases reported in 4 Cranch 179, and 7 How. 612, 625, the court of the state had full cognisance of the subject of controversy, and of all its proper incidents; and, in the case in 7 Howard, the subject was not peculiarly cognisable under proceedings in bankruptcy. In such a case, to enjoin the plaintiff in the state court, would, in effect, have been to enjoin that court, which the Act of 2d March 1793 had prohibited. But, in the present case, if the act of 1793 would otherwise have been applicable, the present Bankrupt Law would exclude its application so far as the present question is concerned. The state court cannot be enjoined. But the litigant in it may be restrained from doing what would frustrate, or directly impede, the jurisdiction expressly conferred by the Bankrupt Act.

The jurisdiction having thus been established, the argument of the motion to dissolve the injunction was heard in the Circuit Court, on bill and answer, by the District Judge (CADWALADER), sitting alone. He said, as to the jurisdiction, that although he had exercised it very cautiously, and would continue to do so, he had never doubted its existence, and that he had asked the attendance of the Circuit Judge merely in order that any doubts of others might be quieted.

In the present case, the motion was refused, and the injunction continued, but modified so as to save the lien of the defendant when the goods should be sold and the money realized.

*District Court of the United States in Bankruptcy, Eastern
District of Pennsylvania. August 31, 1867.*

EX PARTE DONALDSON.¹

An unimpugned creditor's lien having, before the commencement of voluntary proceedings in bankruptcy, attached upon part of the bankrupt's estate, no consideration of probable sacrifice of the subject of the lien under judicial proceedings for its enforcement in a state court, will induce a court of the United States to restrain, delay, or hinder the creditor from prosecuting them. No equity of the general body of the bankrupt's creditors can be asserted for their common, equal benefit, on the mere ground of doubtfulness of his title to the subject of the lien and the danger of consequent sacrifice at a forced sale. *Quære*, whether such an equity can be asserted on their behalf in any case without such a payment of his demand as may substitute the assignee in bankruptcy for him as to the lien.

A PETITION is this day presented by a voluntary bankrupt whose original petition for adjudication and relief was filed on the 6th of the present month. He was adjudged a bankrupt by the register on the 12th, when a warrant was issued appointing the first meeting of creditors for 16th of September next. The present petition referring to a judgment obtained in April last under adversary proceedings against the petitioner, and to an execution under it, asserts that real estate already sold by the sheriff under this execution is alleged by the plaintiff to be the petitioner's, but is denied by the petitioner to be his property. Having been advised that should it ultimately be determined to be his property, it "should go to the benefit of all his creditors in bankruptcy," he presents this petition. The sheriff's deed of conveyance had not been acknowledged. The prayer is for an injunction to restrain the plaintiff from proceeding further on the judgment and execution, "and from having the deed for said property acknowledged by the sheriff." The petition does not expressly state that the plaintiff is the purchaser.

Parsons, for the petitioner, urged the hardship of permitting such a sale, under a doubtful title, to be made, as it must inevitably be at a sacrifice. He submitted to the court the question whether it would not be proper to interfere for the protection of the general body of the creditors. He referred to the case of *Reed*, a bankrupt, on whose petition Judge BLATCHFORD, in the

¹ We are indebted for this case to the Philadelphia Legal Intelligencer.—Ed.
A. L. R.

District Court of the Southern District of New York, had, by injunction, restrained a plaintiff in a judgment and execution against the bankrupt in the Supreme Court of New York from proceeding with an examination of him as a judgment-debtor in that court under a law of the state.

Opinion by

CADWALADER, J.—The case before Judge BLATCHFORD which has been cited has no apparent applicability. There was no question of an existing lien of whose fruits the creditor holding it was to be deprived. Here the equity of the general body of creditors might be to require the proceedings against the land in question to be for common benefit subject to the lien of the judgment-creditor. But in asserting this equity, the general creditors must not frustrate the right of the judgment-creditor to his lien. If there was any probability of a proceeding for common benefit at the suit either of the future assignee, or of a provisional assignee, to establish the title of the bankrupt's general creditors to the land subject to the judgment-creditors' lien, I might under some circumstances, restrain him from selling, in the mean time, at a sacrifice under his execution. This would be a jurisdiction to exercise with great caution; and might in some cases perhaps be exercisable under a bill in equity in aid of the proceedings in bankruptcy, rather than under these proceedings themselves.

The case may stand over for further consideration. In the mean time, if reason be shown, I may appoint a receiver to act as provisional assignee until the complete qualification of an assignee under the provisions of the Act of Congress. Such an assignee could inform himself as to the true interests of the general body of creditors. If a mode can be suggested of promoting their interests without other injury to the judgment-creditor than mere delay until a decision upon the title of the bankrupt, an injunction might possibly be proper. But under what circumstances this might thus be proper, cannot be suggested beforehand.

The foregoing opinion having been filed, the judge added: My last remarks are made only because I do not wish to preclude further argument if it should be desired. At present, I do not see how I can possibly interfere unless upon an offer on the part of the general creditors to make such payment of the judgment-creditor's demand as may substitute the assignee in bankruptcy

for him as to the lien of the judgment; nor how even this can be done after an actual sale by the sheriff, though the purchaser's title may not have been consummated. I do not pause to consider whether the bankrupt is the party who should have presented the petition if it were otherwise a proper one. Perhaps before assignment, it may, under this Act of Congress, be necessary in some cases to allow him to make certain applications which, after assignment, would be more proper on the part of the assignee.

The matter was not afterwards moved.

Court of Appeals of New York.

JOHN B. TREVOR ET AL., APPELLANTS, v. JOHN WOOD ET AL.,
RESPONDENTS.

Where parties residing at a distance from each other agree to communicate by telegraph in their business transactions, the same rules apply in determining whether a contract has been made as in cases of communications by letter.

Therefore, an offer accepted by telegraph constitutes a contract, although the party making the offer attempts to revoke it before his receipt of the acceptance.

An acceptance by letter of an offer is sufficient to make a contract, not by virtue of being sent through the public mail, but because it is an overt act manifesting the intention of the acceptor, and thus making the *aggregatio mentium* which is the essence of a contract. Per SCRUGHAM, J.

APPEAL from a judgment of the Supreme Court, rendered at General Term, in the First District, reversing a judgment entered upon the report of Hon. William Mitchell, referee, and ordering a new trial before the same referee.

The appellants have stipulated that if the judgment be affirmed, judgment absolute may be entered against them.

The appellants are dealers in bullion in New York, and the respondents are dealers in bullion in New Orleans. In 1859 they agreed to deal with each other in the purchase and sale of dollars, and that all communications between them in reference to such transactions should be by telegraph.

On 30th January 1860, the appellants telegraphed from New York, to the respondents, at New Orleans, asking at what price they would sell one hundred thousand Mexican dollars. On 31st of the same month the respondents answered that they would deliver fifty thousand at seven and one-fourth, and on the same day the appellants telegraphed from New York, to the defendants at New Orleans, as follows:

"To John Wood & Co.: Your offer fifty thousand Mexicans at seven and one-quarter accepted; send more, if you can.

"TREVOR & COLGATE."

At the same time the appellants sent by mail to the respondents, a letter acknowledging the receipt of the respondents' telegram, and copying the appellants' telegraphic answer. On the same day the respondents had also sent by mail a letter to the appellants, copying respondents' telegram of that date. On the next day (1st February 1860), the appellants again telegraphed to the respondents as follows:

"To John Wood & Co.: Accepted by telegraph yesterday your offer for fifty thousand Mexicans; send as many more, same price. Reply.

TREVOR & COLGATE."

This telegram, as well as that of 31st of January, from the appellants, did not reach the respondents until 10 A. M., on 4th February 1860, in consequence of some derangement in a part of the line used by the appellants, but which was not known to the appellants until 4th February, when the telegraph company reported the line down. On 3d February the respondents telegraphed to the appellants as follows: "No answer to our despatch—dollars are sold;" and on the same day they wrote by mail to the same effect. The appellants received this despatch on the same day, and answered it on the same day, as follows: "To John Wood & Co.: Your offer was accepted on receipt;" and again the next day, "The dollars must come, or we will hold you responsible. Reply. TREVOR & COLGATE;" and again, on 4th February, insisting on the dollars being sent "by this or next steamer," and saying, "Don't fail to send the dollars at any price." On the same 4th February, the respondents telegraphed to appellants, "No dollars to be had. We may ship by steamer, twelfth, as you proposed, if we have them." No dollars were sent, and this action was brought to recover damages for an alleged breach of contract in not delivering them.

The referee found for plaintiff \$219.33, but the Supreme Court, at General Term, reversed this and entered judgment for the defendants.

SCRUGHAM, J.—The offer of the respondents was made on the 31st January, and they did not attempt to revoke it until the 3d of February. The offer was accepted by the appellants before,

but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case is, whether a contract was created by this acceptance, before knowledge of it reached the respondents.

The case of *Mactier v. Frith*, in the late Court of Errors, (6 Wend. 103), settles this precise question, and was so regarded by this court in *Vassar v. Camp*, 1 Kern. 441, where it is said that the principle established in the case of *Mactier v. Frith* was, "that it was only necessary that there should be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act; that the sending of a letter announcing a consent to the proposal was a sufficient manifestation, and consummated the contract from the time it was sent."

There is nothing in either the case of *Mactier v. Frith*, nor in that of *Vassar v. Camp*, indicating that this effect is given to the sending of a letter, because it is sent by mail through the public post-office; and, in fact, the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places there was at that time no communication by mail.

The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act, clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus making that "aggregatio mentium" which is necessary to constitute a contract.

Mr. Justice MARCY, in delivering the leading opinion in *Mactier v. Frith*, says, "What shall constitute an acceptance will depend, in great measure, upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other actions which are equally conclusive upon the parties; keeping silence, under certain circumstances, is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated, or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract."

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies.

In accordance with this agreement, the offer was made by telegraph to the appellants in New York; and the acceptance, addressed to the respondents in New Orleans, was immediately despatched from New York, by order of the appellants.

It cannot, therefore, be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them, as that by means of which their business should be transacted.

Under these circumstances the sending of the despatch must be regarded as an acceptance of the respondents' offer, and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication, the parties mutually assume its hazards, which are principally as to the prompt receipt of the despatches.

The referee finds as a fact that the respondents answered the telegram of the appellants, asking at what price they would sell 100,000 Mexican dollars, by another telegram, as follows, viz.:

"Trevor & Colgate, New York: Will deliver fifty thousand at seven and one-quarter, per Moses Taylor. Answer.

"JOHN WOOD & Co."

It was proved on the trial that this telegram was sent by the respondents, and a letter of the same date, signed by them, repeating the telegram, and stating that they had sent it, was read in evidence.

This affords sufficient evidence of subscription by the respondents to take the case out of the Statute of Frauds.

The judgment should be reversed.

All the judges concurring except BOCKES and GROVER, JJ., who concurred only in the result. Judgment reversed.

Supreme Court of Vermont. In Chancery.

GEORGE HOWE v. CHARLES B. EDDY AND WALTER TAYLOR.

By the chancery practice of Vermont, where an injunction is awarded, and the complainant takes out a subpoena returnable to the next term of the court, but neglects to get it served in time, the injunction is not thereby dissolved, but a new subpoena may be issued returnable to the next succeeding term.

The respondent may, however, come in at any time, and apply for an order to have the subpoena and bill served on him in order to allow him to answer, or he may move to dissolve the injunction on account of the complainant's delay, or invoke any other action of the court necessary to protect his rights.

RULE on defendants to show cause why they should not be dealt with for contempt of court in disregarding an injunction. Before Chancellor BARRETT, at the General Term of Supreme Court, November 1867, PIERPONT, C. J., PECK, WILSON, and STEELE, JJ., hearing the argument as advisers.

The complainant, in August 1867, was in possession of the law library of the late Hon. William C. Bradley, under a claim of title. One Henry A. Willard, as executor of Mr. Bradley's will, claimed the right, and was about to use a writ of replevin, to take possession of the said library. On the 7th of August 1867, complainant obtained an order, made by Chief Justice PIERPONT as Chancellor, in pursuance of which, on the 8th day of August, the clerk of the Court of Chancery issued a writ of injunction restraining Willard and all persons acting under him from removing the library from the possession of complainant during the pendency of said writ, or until the dissolution of said injunction, or until such further order as the court should make in the premises.

The defendant Eddy, as attorney of Willard, had taken out a writ of replevin; and on the 9th of August went to Brattleboro, where complainant resided and kept the library, for the purpose of having the writ served. On presenting it to Mr. Herrick, a deputy sheriff, he was told that complainant had put in his (Herrick's) hands a bill in chancery and injunction, with directions to serve said injunction on any one whom he should see meddling with the library; and he then exhibited them to Eddy, who examined them. The bill was the one presented to the Chancellor, upon which the order for said injunction, issued by the clerk as aforesaid, was made; and the injunction was the one so issued.

The bill had been filed by the clerk on said 8th day of August, pursuant to the order of the Chancellor, and his certificate of such filing was duly indorsed thereon. A subpoena, dated the same day, signed by the clerk in common form, was appended to said bill, returnable to the September Term of the court, which was to commence on the 10th day of that month. Upon such examination Mr. Eddy concluded not to have said writ of replevin served. Mr. Willard was a resident of Hudson, New York, or Washington, D. C., but was spending the summer in Charlestown, N. H., and was often at Bellows Falls and Westminster, and occasionally at Brattleboro, in said county of Windham, during said month of August. Considerable evidence was exhibited in the case, showing various propositions by Mr. Eddy to complainant for some arrangement for having the bill and injunction served on Mr. Willard; and considerable conflicting evidence as to complainant's expressions of a purpose not to have the same served, unless Mr. Willard, by himself or his agents, should undertake to get possession of the library. The decision of the case, however, did not depend on these facts.

The bill and subpoena were not served seasonably for said term of the court, no arrangement having been made in that behalf, and Willard not having been found within the state by the deputy sheriff. The last day for the legal service of the subpoena was the 29th of August. On the next day complainant procured a new subpoena of the clerk, dated on that day, returnable to next April Term of said court, and substituted it for the one originally appended to said bill, and replaced the papers in the hands of said Herrick, with the same instructions as before. The defendant Eddy being of opinion that said injunction had become inoperative and void by the failure of service of the same with the bill and subpoena upon Mr. Willard seasonably for September Term, and Mr. Willard having been advised by counsel to the same effect, on the 6th day of September, caused a writ of replevin in his favor against complainant, to be put into the hands of the other defendant, Taylor, sheriff of said county, with directions to replevy said library. Eddy accompanied Taylor, at his request, to Brattleboro for that purpose. On arriving there it was found that complainant was absent, and that said library was locked up in his office, and the key not to be found. Taylor procured another key and unlocked the door, and he and Eddy went in

and began to take the books down from the shelves, preparatory to taking them away by virtue of said writ. While they were thus in the process of taking down the books, Herrick the deputy sheriff saw them, and at once forbade them to remove the books, telling them that he had said bill and injunction, which he then showed them, and which they took and made some examination of and passed back. Eddy signified that he regarded the injunction as of no effect for the reason aforesaid, and that he should have the writ of replevin served by the taking of said library. Thereupon Taylor and Eddy proceeded to take and remove said library, and it still remains in the hands of said Taylor. At the September Term of said court complainant filed his petition in said court for an order on said Eddy and Taylor, to show cause why they should not be dealt with for *contempt*. Such order was issued, and evidence was taken showing the facts aforesaid.

H. H. Wheeler, for the orator, cited Gen. Stat. 249, §§ 15, 19; *Payne v. Cowan*, 1 Sm. & M. Ch. Rep. 26; Hilliard on Inj. 111, § 90 a, 92; 4 W. C. C. Rep. 174; *Turner v. Scott*, 5 Rand. Rep. 332; *Harrington v. Am. Ins. Co.*, 1 Barb. 224; *Hightour v. Rush*, 2 Hay's Rep. 361; *Baird v. Moses*, 21 Ga. Rep. 249; *West v. Smith*, 1 Green Rep. 309; *Depeyster v. Graves*, 2 Johns. Ch. Rep. 148; 2 Green Ch. Rep. 458-9; *Moat v. Holbien*, 2 Edw. Ch. 88; *Partington v. Booth*, 3 Meriv. Rep. 148; Barb. Ch. Pr. 636; 4 Paige's Ch. Rep. 163; 8 Id. 45; Hilliard on Inj. 142.

C. B. Eddy and *H. E. Stoughton*, for respondents, cited Hilliard on Inj. 149, § 32; *Elliot v. Osborne*, 1 Cal. Rep. 396; 1 Barb. Ch. Pr. 631, 633, 634; *Skip v. Howard*, 3 Atk. 564; *Hearne v. Tenant*, 14 Ves. 186; Smith's Ch. Pr. 623-4; *James v. Downes*, 18 Ves. 522; 3 Dan. Ch. Pr. 1773, 1775, 1783; Gen. Stat. 253, § 55; Hilliard on Inj. 520; Gen. Stat. 249, §§ 19-20; 4 Paige 439; 5 Id. 85; 2 Mad. 225; Rule 26 in Chancery.

BARRETT, Chancellor, after stating the facts.—The views now to be expressed are concurred in by all the judges who heard the argument.

A primary, and, to a considerable extent, a controlling question is, whether the failure to have service made on Willard season-

ably for the term to which the first subpoena was made returnable, worked a discontinuance of the proceeding, so that the order of the Chancellor, and the injunction issued in pursuance of it, became vacated and void. Our statute, ch. 29, § 55, enacts that "no injunction shall be issued in any case until the bill shall have been filed." Sect. 56: "The issuing of a subpoena, attached to a bill, shall be deemed the filing of the bill." It was not the purpose of the latter section to exclude any other mode of filing a bill, but rather to provide a mode by which, for the purpose of issuing an injunction, it might be regarded as filed, without requiring it actually to be filed in court according to the law and practice independently of the statute. This is evident from other provisions of the same chapter. For instance, in sect. 21, when the defendant is out of the state, so that the subpoena cannot be served on him, the complainant may file his bill or petition in the office of the clerk, and the clerk shall issue an order to be published three weeks successively, the last publication to be at least twenty days previous to the term at which the defendant is required to appear. It is beyond question that in such a case, upon a bill thus filed, a subpoena need not be attached, and still the bill would be *filed*, so as fully to comply with the statute requiring it to be filed before an injunction should be issued. For it will hardly be suggested that an injunction might not as well be granted against a non-resident defendant (his agents, servants, and attorneys), upon whom, by reason of his non-residence, a subpoena could not be served, as against a resident, on whom a subpoena could be served. This would strongly indicate that the 19th and 20th sections of ch. 29 were not designed to make, as is claimed, the bill and subpoena *one process*. In the present case it would have been legitimate for complainant to file his bill in the clerk's office, and not have a subpoena appended, and to take an order for notice to be published, calling on the defendant to appear and answer at the next April Term, instead of the September Term, as, at the time he applied for the injunction, there was not sufficient time to give notice in that way for the September Term. He, however, did take a subpoena, and that was, as it must have been, made returnable to said September Term. He, at the same time, had his bill actually filed, and the certificate thereof duly indorsed on it by the clerk. If he should get the subpoena seasonably served, he would not need to resort

to any other mode of service ; but if he should not, it would seem to be a strange effect to give to the fact of his taking a subpoena and failing to get it served, to hold that thereby he lost any right that he would have had if he had not taken such subpoena. Sections 19 and 20 do not purport to make the bill and subpoena one process. Sect. 19 provides that process issued out of the Court of Chancery shall be signed by the clerk or a chancellor, without defining what shall constitute *process*. It may be *original*, as a subpoena. It may be *final*, as an execution. It may be a writ of sequestration, or it may be an injunction. Sect. 20 only provides that the *original* subpoena, with the bill, shall be served in the same manner as writs of summons. That obviously is designed to apply to cases in which service is to be made for the purpose of bringing the party into court to answer the bill, and await upon the proceeding in due course of ordinary litigation in that court, and only to cases in which the subpoena and service of it constitute the only mode of effecting that purpose. It does not undertake to connect the two as necessary to constitute the *process* meant in the preceding section, but only to prescribe the mode in which the *subpoena* shall be served for the purpose intended, viz.: it shall be served with the bill. In the English chancery law the subpoena is entirely distinct from the bill for all purposes. The bill is filed in the court before any subpoena is issued. It is issued in pursuance of the prayer of the bill thus filed, and its office is to compel the defendant to appear and answer the same: (see Smith's Ch. Pr. 110). There is an exception to the necessity of having the bill filed before subpoena is issued, when the bill prays that an injunction may be awarded against the defendant; in which case it is sufficient if the bill be filed on or before the day on which the subpoena is made returnable: (see *Id.*). The subpoena alone is served, the bill remaining on file; and successive subpoenas may be obtained to meet the various exigencies that may require this to be done in the progress of the cause. Various considerations of supposed inconvenience and injury likely to result to the defendant have been suggested, as reasons why the court should hold as claimed by the respondents. But they do not seem to be well grounded. When a bill has been presented to a chancellor for some preliminary or interlocutory order warranted by the law, the cause is then to be regarded as pending in court for all purposes arising

from or incident to such order; and for all such matters the court is at all times open and accessible to all the parties affected thereby. If an order has been obtained *ex parte*, which affects the other party, and he has knowledge of it, he may at once, and at any stage, come before the court with any proper application in the premises, and invoke any action by the court that may be proper to secure his rights and serve his convenience. If, for instance, an injunction has been obtained which operates upon his interests, without having been served on him with the subpoena and bill, and which he desires to have dissolved, and in order thereto it is necessary for him to answer the bill, on application to the Chancellor he could obtain an order that the subpoena with the bill should be served, or a copy of the bill furnished to him by a time named. In the present case, Mr. Willard, having been fully apprised of the existence of the bill and injunction, which had not been served on him seasonably for the September Term, might have appeared in court at that term, and moved to have the cause entered on the docket, and it would have been so ordered; and then it would have stood, for all proper proceedings, the same as if the bill and injunction had been formally served. If there had been improper delay in the service of the bill or of the injunction, he might have appeared before the Chancellor and moved for the dissolution or discharge of the injunction. The cause was in fact pending in the court from the time the Chancellor made the order for issuing said injunction. But, though the defendant was not *bound* to appear and answer to it, still he was at liberty to do so, and it would not have been permissible for the orator to object.

Without taking further time to discuss or illustrate this aspect of the case, in the opinion of the court, the failure to serve the original subpoena with the bill and injunction did not work a discontinuance affecting the validity and force of the order of the Chancellor, or of the injunction issued in pursuance of it, and the same, notwithstanding such failure, were in force at the time said injunction was exhibited to the respondents by the deputy sheriff on the occasion of taking away said library.

The evidence is satisfactory that the complainant did not intend to discontinue his bill, or the order and process of injunction, and we think that the course he pursued did not work such a result.

This brings us to the inquiry, whether, even if it were shown

that he improperly delayed to have said papers served, to such an extent as to constitute adequate ground for a dissolution of the injunction, on motion for that cause, it was lawful, or justifiable, for the respondents to disregard, and act in violation of it. On this point there seems to be entire uniformity in the text-books and cases: 3 Dan. Ch. Pr. 1782. "Although an injunction be irregularly obtained, it is still an order of the court, and must be discharged before it can be disobeyed." Edw. on Inj. 102; Barb. Ch. Pr. 636; Edwards' Ch. Rep. 188, and note. No case or book has been cited showing that, in any case, does mere impropriety in using an injunction work a dissolution or discharge of it, and leave a party, who is so charged with knowledge of it as to be amenable for contempt if he violates it, at liberty to violate or disregard it. The most that has been held is, that such impropriety may be good cause for a dissolution or discharge on motion: 3 Dan. Ch. Pr. 1783 (note 3), and cases cited; 2 J. C. Rep. 204; 5 Paige 85; 1 Hopkins 342. In the case of *James v. Downes*, 18 Ves. 522, the plaintiff, after obtaining an order, neglected for four months to have it drawn up or served. Lord ELDON would not proceed for contempt against the other party, who, after that lapse of time, acted in disregard of it, his only knowledge of it being that he was present at the hearing of the motion. In *Drewry on Inj.* 399, in remarking on that case, it is said, "The distinction seems that the defendant shall not escape the process, if he heard the motion, merely by turning his back upon the court so as not actually to hear it pronounced; but that, on the other hand, the order is not to be kept suspended over his head for an indefinite length of time." That case does not apply to this, for the reason that the defendant, Willard, had full knowledge of the bill and injunction, and Eddy, his attorney, had seen it on the 9th of August, and he and Taylor both knew of and saw it on the 6th day of September, before they took the books, when it was presented to them as being in force to restrain them from so doing; and for the still other reason, that, in view of all that appears in the case, Willard did not put himself in position to entitle him to claim that complainant had unreasonably delayed making service of the bill. His knowledge of the bill and injunction charged him with the duty of regarding said injunction, and it was so known to, and served upon the respondents as to charge them with the same duty: *Lawes v. Morgan*, 5 Price

Rep. 518. The defendant in the bill being non-resident in the state, it appertained to him, under the circumstances, to show that he had exposed himself to service to the knowledge of the orator or the officer holding the papers, so that service might have been made on him with reasonable convenience, without bargaining or watching for an opportunity. Indeed, no question is made, but that the defendant, as well as the respondents, had sufficient notice and knowledge of the injunction to render it operative upon them, provided it was in force at the time the respondents took the library. The cases cited in their behalf bear in their favor only as touching the order that the court should make as to punishment, by fine or otherwise, for the violation of said injunction: see *Partington v. Booth*, 3 Meriv. 148; 4 Paige 444. In this case it is not claimed, or shown, that the respondents acted with intent of violating or disregarding an injunction that was in force. They acted upon the honest, though erroneous opinion, that the injunction had expired. In so doing they violated the legal rights of the complainant. Full satisfaction to the complainant and to the court will be made by the restoration of the library to the possession of the complainant, in the place and condition from which it was taken by the respondents. A proper order will be made to effect such restoration.

United States Circuit Court for Wisconsin. Nov. Term 1867.

JOHN GREENING, OWNER OF SCHOONER PERSEVERANCE, v.
SCHOONER GREY EAGLE.¹

The fact that one vessel carries a prohibited light does not absolve another from the observance of the caution and nautical skill required by the exigencies of the case.

Although a white light usually represents a vessel at anchor, an omission to watch the light and ascertain from its bearings whether the vessel is in motion, is a neglect of ordinary care and skill, and makes the collision the result of mutual fault.

There may be circumstances under which a vessel that is unable to show the proper lights may nevertheless continue her voyage at night. Per DAVIS, J.

THIS was a libel for collision, first tried at Milwaukee in the

¹ We are indebted for this case to the courtesy of J. D. Cleveland, Esq.—ED.
AM. LAW REG.

District Court of the United States for the District of Wisconsin, in which court the action was dismissed. Libellant appealed to the Circuit Court, where the case was again argued on the same pleadings and evidence.

The schooner *Perseverance* sailed from Chicago on the 19th of November 1864, with a cargo of wheat, bound for Ogdensburg. When in Lake Michigan, off the Manitow Islands during a severe storm she lost her signal lights which she was unable to replace after making efforts to do so. Owing to the lateness of the season, the severity of the weather, and the extent of her voyage, being unwilling to incur the delay of lying by at night, she proceeded on her way showing at night a white light in order to call the attention of other vessels to her. While running through the Straits of Mackinaw, at two o'clock in the morning of the 24th of November, the schooner *Grey Eagle*, bound from Buffalo to Milwaukee, collided with her and destroyed both vessel and cargo.

Willey & Cary, of Cleveland, for libellant.

Emmons & Vandyke, of Milwaukee, for defendant.

The opinion of the court was delivered by

DAVIS, J.—It is argued that as the *Perseverance* was running without the regular lights and with the prohibited white light, she must bear all the damages, although the court should find that the *Grey Eagle* was also in fault. This position is untenable. It is unquestionably true that the rules of navigation as prescribed by the Act of Congress must be observed, but in obeying and construing these rules, due regard must be had to all dangers of navigation. The fact that the *Perseverance* had a light prohibited to vessels while sailing, did not of itself absolve the *Grey Eagle* from the observance of that degree of caution, care, and nautical skill which the exigencies of the case required. If a white light *usually* represented a vessel at anchor, the officers and seamen of the *Grey Eagle* had no right to conclude that it *always* did. It was their duty from the moment the light was seen, to have watched it carefully, in order to ascertain from its bearings whether the vessel was in motion or at anchor. And if, in the exercise of ordinary nautical skill and care, *this* could have been done, and was omitted, and this omission contributed to the accident, then the *Grey Eagle* must share the burdens of the loss although

the *Perseverance* was in fault in running with a prohibited light. I cannot say that a vessel is under all circumstances required to come to an anchor at night, if through misfortune she has lost her signal lights. There may be a state of case in which herself and cargo would be in more peril by delay at night than by pursuing a continuous voyage. It is true that she encounters serious hazard by running at night, but she is so far protected that every other vessel occupying the same waters must be navigated with reasonable care, skill, and caution.

The obligation of the *Grey Eagle* to use all reasonable precautions to avoid a collision was not varied because the *Perseverance* was running with a prohibited light. The present case is one of mutual fault, which in my opinion requires a division of damages. It is unnecessary to discuss the evidence at length in order to show carelessness and fault on the part of the *Grey Eagle*. She is convicted of ordinary want of seamanship in her own statement of the collision.

The answer says, "A white light was seen about a mile distant, which was supposed to be a light on shore or upon a vessel at anchor. The *Grey Eagle* was then kept away about a point and steadied in her course, to give berth to the light. The light was not discovered to be a vessel's light in motion by the commanding officer until the *Perseverance* got within about three lengths of the vessel."

And why was this important discovery not sooner made? The night was not too dark to do it, for the evidence is that the sails of the *Perseverance* could readily have been seen a quarter of a mile off, and the wheelsman of the *Grey Eagle* (in not the best portion of the vessel to see the light) nevertheless saw it twenty minutes before the collision.

If the light was discovered a mile off, is it not apparent that ordinary vigilance would have disclosed to those on board the *Grey Eagle* that it was on a vessel in motion long before there was any danger of collision? The vessels could not have kept their respective courses without it being evident to a watchful seaman that the light was in motion. I cannot for want of time analyze the evidence so as to show how the collision could have been avoided if the light of the *Perseverance* had been properly watched. It is very clear the persons in charge of the *Grey Eagle* were so confident the light was stationary that they rested

in security and omitted the observations which good and prudent seamanship required to be made, and which, if made, could not have failed to have disclosed to them the character of the light, and enabled them to keep out of the way of the *Perseverance*. This conduct on the part of the *Grey Eagle* contributed very materially to the collision, and that vessel should share with the *Perseverance* the consequences of that disaster.

The Clerk of the Circuit Court is therefore directed to enter an order, reversing the decree of the District Court, and referring the case to a commissioner, to ascertain the damages.

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Superior Court of Chicago.

WILLIAM O'MEARA v. PATRICK DEAN ET UX.

PATRICK DEAN AND WIFE v. O'MEARA.

A deed of her separate estate executed by a married woman without her husband joining, is void.

THESE were cross-bills for partition. One Patrick Rider died in 1856, seised of certain real estate, which he devised equally to his wife, Mary Rider, now Mary Dean, and his daughters, Margaret, Mary Ann, and Catharine. Catharine intermarried in 1862 with one Almeron Smith, and died in 1865, in Memphis, Tenn. In 1864, for a valuable consideration, part of which was paid down, Catharine Smith executed to her mother, residing in Chicago, a deed of her undivided interest in the lot. The deed was formally delivered by Mrs. Smith to the grantee therein, but was afterwards redelivered to her for the purpose of procuring its execution by her husband in Memphis. The husband refused to execute it, and it was never returned to the grantee.

The opinion of the court was delivered by

JAMESON, J.—The question raised is, whether the transfer from Mrs. Smith to her mother was effectual to convey her title, the grantor being at the date of the deed a *feme covert*. This makes it necessary to construe the Statute of 1861, entitled "An Act to protect married women in their separate property." The terms of the act are, "that all the property, both real and personal, belonging to any married woman as her sole and separate pro-

perty, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires, in good faith, from any person, other than her husband, by descent, devise, or otherwise, together with all rents, issues, increase, and profits thereof shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her, the same as though she was sole and unmarried, and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

This is a remedial statute, and must be so construed as to advance the remedy intended by its framers. It is contended by the counsel for Mrs. Dean, the grantee, that the phraseology of the statute is so broad as to give to a married woman the *jus disponendi*, that is, the right to sell, encumber, or devise her property, independently of her husband. The property of the wife, it is said, is to be and remain her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her, the same as though she were sole and unmarried. How, it is asked, can a married woman hold, own, possess, and enjoy her property the same as though she were sole and unmarried, unless she have the right of selling it? It must be admitted, the language of the act is very strong; but I cannot think it decisive. It is unsafe to construe a statute by reference alone to its terms. The court must ask, what was the mischief against which this act was aimed? In the case of the property of married women, before the statute, the mischief was that the personal chattels of the wife, upon her marriage, became absolutely the property of her husband. Her *choses in action* became his absolutely when reduced to his possession; and "the rents, issues, increase, and profits" of the real estate came at once into his hands upon the marriage, subject to his absolute disposition. Thus, everything that was his wife's became, for the purpose of present enjoyment, the husband's, and so far as its nature permitted, was liable to execution or attachment for his debts. The evil, therefore, was, not that the wife could not sell without her husband's consent—for the husband was generally eager to sell that he might enjoy the proceeds—but that the husband had the power to squander the wife's property, or its rents and profits, without her consent.

At last our legislature came to see the injustice of such a condition, and they passed, in 1861, an act to remedy it. That act shows in its title the scope intended by it. It was "an act to protect married women in their separate property," not to enable them to divest themselves of it without the concurrence of their husbands. Other considerations point to the same conclusion. The strong words of the act, authorizing a married woman to hold and enjoy her property "as though she were sole and unmarried," must be construed with reference to the marriage relation between the parties. Suppose the wife owns the homestead, including buildings and furniture. Has the husband no rights with respect to it? May she sell it away from him in spite of his protest, or, if she choose to retain it, bring trespass if he enter her house, seat himself at her table, or approach her bed? This would make of the statute an act for the divorcement, *a mensa et thoro*, at their own discretion, of all married women having property of the species indicated. The meaning of the statute, then, must be that the wife is to enjoy her separate property as though sole and unmarried, so far as a married woman can, that is, enjoy it together with her husband, and not to the exclusion of him: *Naylor v. Field*, 5 Dutch. 287; *Walker v. Reamy*, 36 Penn. St. 414. She is to be protected in the use of it, with her husband and children, against the husband himself and his creditors. The act, moreover, seems to protect the husband in such rights as he may have after the death of the wife. She is to hold, possess, and enjoy her property "during coverture" only. If the wife die, what right has the husband to his wife's property? He has the right, under the conditions prescribed by law, to a tenancy, by the curtesy, in his wife's lands—a right often of great value. The conditions of its arising are: 1. Marriage; 2. Actual seisin of the wife during coverture; 3. Issue born alive; and, 4. Death of the wife: 4 Kent Com. 29. By the common law in force in this state, this estate vests in the husband immediately upon the birth of a child, and is called a tenancy by the curtesy *initiate*. On the death of the wife the right becomes *consummate*. We cannot presume that the legislature intended to take away so important a right, unless it has used words necessarily importing such an intention. Not only is no such intention derivable from the statute, but the contrary is clearly expressed. It limits the time during which the wife may hold and enjoy her property, in

the manner indicated, to the coverture, thus leaving such inchoate rights as the husband may have to his wife's estate to ripen and fall to him after the coverture is ended. The words of the statute are, shall hold, possess, enjoy, &c., "during coverture." The husband having thus an interest in his wife's lands from the moment of the birth of a living child, the wife cannot, without his joining in the deed, convey them so as to defeat the right; and, as there must be but one rule for construing the statute, if the wife cannot convey where there is an *initiate* right of curtesy, she cannot, under this statute, where there is none. In other words, the law of Illinois provides a mode in which the wife joining with her husband may alienate her lands. It is not to be presumed the legislature intended to repeal this provision by the Act of 1861, unless the intention is very clearly expressed. Not only is no such intention expressed, but it is highly probable, from the terms of the act itself, that the object of it was merely to protect the wife in the enjoyment of her property, as far as the nature of her relation as a married woman would permit, and leave to the husband after her death such rights as he might have acquired. Since the argument of this case, and, indeed, since this opinion was written, a decision of our Supreme Court has been published, *Rose et al. v. Sanderson*, 38 Ill. R. 247, which strengthens me in the conclusion I have reached. In that case, real estate had descended to a married woman, from her father, before the Act of 1861 was passed. At the time the act went into effect she was the mother of several children, born alive under circumstances such as to give her husband a tenancy in her lands by the curtesy. The husband's interest in these lands being attached and sold for his debts, a bill was filed to set aside the levy, on the ground that the entire interest in the lands was exempted from levy and sale under the Act of 1861. It was held by the court that the husband's interest as tenant by the curtesy was liable to attachment for his debts, and the bill was dismissed.

Obviously, if the husband had an interest in the lands belonging to his wife at the date of the act, which his creditors could take and hold as against the wife, she could not, by a sale made without the concurrence of her husband, divest him of such interest. The legislature could not empower her to do so.

To the same general effect, also, are those decisions in other

states on statutes similar to ours, that a power to a married woman to take and enjoy property to her separate use does not involve the *jus disponendi*, the right to sell, pledge, or encumber it: *Miller v. Wetherby*, 12 Iowa 415; *Naylor v. Field*, 5 Dutcher 287; *Walker v. Reamy*, 36 Penna. St. 410.

The case of *Billings v. Baker*, 28 Barb. 343, is no authority against the position assumed here, because the New York statute, under which it arose, authorized the wife not only to take and hold to her separate use, but to "convey and devise," real and personal property.

There having been, therefore, no transfer to Mrs. Dean by the conveyance in question, a decree will be entered accordingly.

Circuit Court of the United States. District of Kentucky.

THE UNITED STATES v. JOHN RHODES ET AL.¹

Under the 13th Amendment to the Constitution of the United States, abolishing slavery and giving to "Congress power to enforce this Article by appropriate legislation," Congress is authorized to pass the Act of April 6th 1866, known as the CIVIL RIGHTS LAW, and said law is constitutional.

Under this act all persons stand upon a plane of equality before the law, as respects the civil rights therein mentioned and intended to be protected, without distinction as to race or color or any previous condition of slavery.

If a state law denies any of these rights, *e. g.*, the right of colored persons to testify, this act gives to the courts of the United States jurisdiction of all causes, civil and criminal, which affect or concern such persons.

Where a white person commits the crime of burglary, by breaking and entering the house of a colored person, in a state whose laws deny to such colored person the right to testify against the accused, the latter may be indicted, prosecuted, and convicted for such offence in the Courts of the United States.

THIS was an indictment for burglary, prosecuted in this court under the Act of Congress of the 6th of April 1866, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication." The indictment charged that the defendants, being white persons, did on the night of May 1st 1866, in the county of Nelson, burglariously break and enter the house of Nancy Talbot, a citizen of the United

¹ We give a large amount of space to the following case, on account of the general interest it has excited, as shown by letters of inquiry particularly from our subscribers in the Southern States.—ED. AM. LAW REG.

States, of African descent, who was then and is now denied the right to testify against the defendants in the courts of Kentucky

The defendants having been found guilty by a jury, a motion was made in arrest of judgment.

Three grounds were relied upon in support of the motion :—

1. That the indictment was fatally defective.
2. That the case which it makes, or was intended to make, is not within the Act of Congress upon which it is founded.¹
3. That the act itself is unconstitutional and void.

1. The objection to the indictment was, that it averred that the right to testify was denied to the prosecutor by the law of Kentucky, but did not aver that white persons possessed such right. The court, however, was of opinion that the count was good, because the right of white persons to testify under similar circumstances was given by a public statute of Kentucky, of which the court was bound to take notice, and being a conclusion of law from the facts stated, needed not to be averred in the indictment ; citing 1 Chit. Crim. Law 188 ; 2 Bos. & Pull. 127 ; 2 Leach 942 ; 1 Bishop's Crim. Proced. §§ 52, 53.

2. The 1st section of the act provides that all citizens of the United States shall have the same rights in every state . . . to sue, be parties, and *give evidence*. The 3d section gives jurisdiction to this court "of all causes, criminal and civil, *affecting* persons who are denied, or cannot enforce in the courts of the state where they may be, any of the rights secured to them by the 1st section." It was argued that in a criminal prosecution the only persons *affected* are the government and the accused, and therefore this was not a case affecting Nancy Talbot within the act : *U. S. v. Ortega*, 11 Wheat. 467. The court was of opinion, however, that the phrase "causes civil and criminal" must be understood to mean *causes of civil action* and *causes of criminal prosecution*, which do affect the plaintiff in the one case, and the party against whose person or property the offence is committed in the other : *Osborn v. Bank of U. S.*, 9 Wheat. 584. The construction contended for would limit the operation of the act to the prosecution of colored persons, a purpose already provided for by the laws of all the states. The plain intent of the act was

¹ On account of the great length of the case we are obliged to abridge the report of the first and second points.—ED. AM. LAW REG.

to protect such persons in cases where the laws of the states in which they lived failed to do so.

3. As to the constitutionality of the act.

SWAYNE, J.—The first eleven amendments of the constitution were intended to limit the powers of the government which it created, and to protect the people of the states. . . .

The twelfth amendment grew out of the contest between Jefferson and Burr for the presidency.

The thirteenth amendment is the last one made. It trenches directly upon the power of the states and of the people of the states. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the states where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it for ever the power to replace it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right, and by strong sense of justice, to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

The Act of Congress confers citizenship. Who are citizens, and what are their rights? The constitution uses the words "citizen" and "natural born citizens;" but neither that instrument nor any Act of Congress has attempted to define their meaning. British jurisprudence, whence so much of our own is drawn, throws little light upon the subject. In Johnson's Dictionary "Citizen" is thus defined: "1. A freeman of a city; not a foreigner; not a slave; 2. A townsman, a man of trade; not a gentleman; 3. An inhabitant; a dweller in any place." The definitions given by other English lexicographers are substan-

tially the same. In Jacob's Law Dictionary (edition of 1783), the only definition given is as follows: "Citizens (*cives*) of London are either freemen or such as reside and keep a family in the city, &c.; and some are citizens and freemen, and some are not, who have not so great privileges as others. The citizens of London may prescribe against a statute because their liberties are re-enforced by statute:" 1 Roll. 105.

Blackstone and Tomlin contain nothing upon the subject. "The word *civis*, taken in the strictest sense, extends only to him that is entitled to the privileges of a city, of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant within the same city, for every inhabitant there is not a citizen:" *Scott qui tam v. Swartz*, Com. Rep. 68.

"A citizen is a freeman who has kept a family in a city:" *Roy v. Hanger*, 1 Roll. Rep. 138, 149.

"The term citizen, as understood in our law, is precisely analogous to the term subject in the common law; and the change of phrase has entirely resulted from the change of government. The sovereignty has been changed from one man to the collective body of the people, and he who before was a *subject of the king* is now a *citizen of the state*:" *The State v. Manuel*, 4 Dev. & Batt. 26.

In *Shanks et al. v. Dupont et al.*, 3 Peters 247, the Supreme Court of the United States said: "During the war each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The Americans insisted upon the allegiance of all born within the states respectively; and Great Britain asserted an equally exclusive claim. The treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from their allegiance to the British Crown, and those who then adhered to the British Crown, were deemed and held subjects of that Crown. The treaty of peace was a treaty operating between the states on each side, and the inhabitants thereof; in the language of the seventh article, it was a 'firm and perpetual peace between his Britannic Majesty and the said states, and between the subjects of the one and the citizens of the other.' Who then were *subjects* or *citizens* was to be decided by the state of facts. If they were originally subjects of Great Britain, and

then adhered to her and were claimed by her as subjects, the treaty deemed them such; if they were originally British subjects, but then adhering to the states, the treaty deemed them citizens."

All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons: 2 Kent's Com. (last ed.) 1; *Calvin's Case*, 7 Coke 1; 1 Bl. Com. 366; *Lynch v. Clark*, 1 Sandf. Ch. Rep. 139.

The common law has made no distinction on account of race or color. None is now made in England nor in any other Christian country of Europe.

The fourth of the Articles of Confederation declared that "*the free inhabitants* of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the United States," &c. On the 25th of June 1778, when these Articles were under consideration by the Congress, South Carolina moved to amend this fourth article by inserting after the word "free" and before the word "inhabitants," the word "white." Two states voted for the amendment and eight against it. The vote of one was divided: *Scott v. Sandford*, 19 How. 575. When the Constitution was adopted free men of color were clothed with the franchise of voting in at least five states, and were a part of the people whose sanction breathed into it the breath of life: *Scott v. Sandford*, 19 How. 573; *The State v. Manuel*, 2 Dev. & Batt. 24, 28.

"Citizens under our constitution and laws mean free inhabitants born within the United States or naturalized under the laws of Congress:" 1 Kent's Com. 292, note.

We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor and subject only to the same exceptions, since as before the Revolution.

It is further said in the note in 1 Kent's Commentaries, before referred to: "If a slave born in the United States be manumitted

or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several states may deem it expedient to prescribe to persons of color."

In the case of *The State v. Manuel* it was remarked: "It has been said that by the Constitution of the United States, the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any state by its municipal regulations to make a citizen. But what is *naturalization*? It is the removal of the *disabilities* of *alienage*. Emancipation is the removal of the *incapacity* of slavery. The latter depends wholly upon the internal regulations of the state. The former belongs to the government of the United States. It would be dangerous to confound them:" p. 25. This was a decision of the Supreme Court of North Carolina, made in the year 1836. The opinion was delivered by Judge GASTON. He was one of the most able and learned judges this country has produced. The same court, in 1848, Chief Justice RUFFIN delivering the opinion, referred to the case of *The State v. Manuel*, and said: "That case underwent a very laborious investigation by both the bench and the bar. The case was brought here by appeal, and was felt to be one of very great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence upon all questions of a similar nature:" *The State v. Newcomb*, 5 Iredell R. 253.

We cannot deny the assent of our judgment to the soundness of the proposition that the emancipation of a native born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the Act of Congress conferring citizenship was unnecessary and is inoperative. Granting this to be so, it was well, if Congress had the power, to insert it, in order to prevent doubts and differences of opinion which might otherwise have existed upon the subject. We are aware that a majority of the court in the case of *Scott v. Sandford*, arrived at conclusions different from those we have expressed. But in our judgment these points were not before them. They decided that the whole case, including the agreed facts, was open to their examination, and that Scott was a slave. This central and controlling fact excluded all other questions, and what was said upon them by those of the majority, with whatever learning and ability the

argument was conducted, is no more binding upon this court as authority than the views of the minority upon the same subjects: *Carroll v. Carroll*, 16 How. 237.

The fact that one is a subject or citizen determines nothing as to his rights as such. *They* vary in different localities and according to circumstances.

Citizenship has no necessary connection with the franchise of voting, eligibility to office, or indeed with any other rights, civil or political. Women, minors, and persons *non compos* are citizens, and not the less so on account of their disabilities. In England, not to advert to the various local regulations, the new reform bill gives the right of voting for members of Parliament to about 800,000 persons from whom it was before withheld. There, the subject is wholly within the control of Parliament. Here, until the 13th amendment was adopted, the power belonged entirely to the states, and they exercised it without question from any quarter, as absolutely as if they were not members of the Union.

The first ten amendments to the constitution, which are in the nature of a bill of rights, apply only to the national government. They were not intended to restrict the power of the states: *Barrows v. The Mayor, &c.*, 7 Peters 247; *Withers v. Buckley et al.*, 20 How. 84; *Murphy v. The People*, 2 Cowen 818.

Our attention has been called to several treaties by which Indians were made citizens; to those by which Louisiana, Florida, and California were acquired, and to the act passed in relation to Texas. All this was done under the war and treaty-making powers of the constitution, and those which authorize the national government to regulate the territory and other property of the United States, and to admit new states into the Union: *American Ins. Co. v. Canter*, 1 Peters 511; *Cross v. Harrison*, 16 How. 164; 2 Story on the Const. 158.

These powers are not involved in the question before us, and it is not necessary particularly to consider them. A few remarks, however, in this connection will not be out of place. A treaty is declared by the constitution to be the "law of the land." What is unwarranted or forbidden by the constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the state governments, the subjects upon which it operates are few in number. Its objects are all national.

It is one wholly of delegated powers. The states possess all which they have not surrendered ; the government of the Union only such as the constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void.

"The power to make colored persons citizens has been actually exercised in repeated and important instances. See the treaty with the Choctaws of September 27th 1830, art. 14 ; with the Cherokees of May 20th 1836, art. 12 ; and the treaty of Guadaloupe Hidalgo of the 2d of February 1848, art. 8 :'' *Scott v. Sandford*, 19 Howard 486—Judge CURTIS' opinion.

See, also, the treaty with France of April 30th 1803, by which Louisiana was acquired, art. 3 ; and the treaty with Spain of the 23d of February 1819, by which Florida was acquired, Art. 3.

The article referred to in the treaty with France, and in the treaty with Spain, is in the same language. In both, the phrase "inhabitants" is used. No discrimination is made against those, in whole or in part, of the African race. So in the treaty of Guadaloupe Hidalgo (articles 8 and 9), no reference is made to color.

Our attention has been called to three provisions of the constitution, besides the 13th amendment, each of which will be briefly adverted to.

1. Congress has power "to establish an uniform rule of naturalization :'' Art. 1, § 8. After considerable fluctuations of judicial opinion it was finally settled by the Supreme Court that this power is vested exclusively in Congress: *Collet v. Collet*, 2 Dall. 294 ; *United States v. Velati*, 2 Dall. 370 ; *Golden v. Prince*, 3 Wash. C. C. R. 313 ; *Chirac v. Chirac*, 2 Wheat. 259 ; *Houston v. Moore*, 2 Wheat. 49 ; *Federalist*, No. 32.

An alien naturalized is "to all intents and purposes a natural born subject :'' Co. Litt. 129.

"Naturalization takes effect from birth ; denization from the date of the patent :'' Vin. Ab., tit. *Alien D.*

Until the passage of a late Act of Parliament, naturalization in England was effected by a special statute in each case. The statutes were usually alike. The form appears in *Godfrey v. Dickson*, Cro. Jac. 589, c. 7. Under the late act, a resident alien may accomplish the object by a petition to the secretary of state for the home department.

The power is applicable only to those of foreign birth. Alienage is an indispensable element in the process. To make one of domestic birth a citizen, is not naturalization, and cannot be brought within the exercise of that power. There is an universal agreement of opinion upon this subject: *Scott v. Sandford*, 19 How. p. 578; 2 Story on the Constitution 44.

In the exercise of this power Congress has confined the law to *white persons*. No one doubts their authority to extend it to all aliens, without regard to race or color. But they were not bound to do so. As in other cases, it was for them to determine the extent and the manner in which the power given should be exercised. They could not exceed it, but they were not bound to exhaust it. It was well remarked by one of the dissenting judges in *Scott v. Sandford*, 19 Howard 586, in regard to the African race: "The constitution has not excluded them, and since that has conferred on Congress the power to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States." It may be added that before the adoption of the constitution, the states possessed the power of making both those of foreign and domestic birth citizens, according to their discretion. This power as to the former they surrendered. They did not as to the latter, and they still possess it.

"The powers not delegated to the United States by this constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people:" Cons., 10th amendment.

What the several states under the original constitution only could have done, the nation has done by the 13th amendment. An occasion for the exercise of this power by the states may not, perhaps cannot, hereafter arise.

2. "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states:" Cons., art. 4, § 2.

This provision of the constitution applies only to citizens going from one state to another.

"It is obvious that if the citizens of each state were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens."

"The intention of this clause was to confer on them, if one may so say, a general citizenship, and to communicate all the privi-

leges and immunities which *the citizens* of the same state would be entitled to under the same circumstances:" 2 Story on Cons., § 187.

Chancellor KENT says: "If citizens remove from one state to another they are entitled to the privileges that persons of *the same description* are entitled to in the state to which the removal is made, and to none other:" 2 Com. 36.

This provision does not bear particularly upon the question before us, and need not be further considered.

3. "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence:" Art. 4, § 4.

Mr. Justice STORY, adopting the language of the Federalist, says, that but for this power, "a successful faction might erect a tyranny on the ruins of order and law, while no succor could be constitutionally afforded by the Union to the friends and supporters of the Government." * * * "But a right implies a remedy, and where else could the remedy be deposited than where it is deposited by the Constitution?" 2 Story on Const. 559, 560.

This topic is foreign to the subject before us. We shall not pursue it further.

Congress, in passing the act under consideration, did not proceed upon this ground. It is not the theory or purpose of the act to apply the appropriate remedy for such a state of things.

The constitutionality of the act cannot be sustained under this section.

This brings us to the examination of the thirteenth amendment. It is as follows:

"Article XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Before the adoption of this amendment, the Constitution, at the close of the enumeration of the powers of Congress, authorized that body "to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers, and all

other powers vested by this Constitution in the Government of the United States, or any department or officer thereof."

In *McCulloch v. Maryland*, Chief Justice MARSHALL used the phrase "appropriate" as the equivalent and exponent of "necessary and proper" in the preceding paragraph. He said: "Let the end be legitimate, let it be within the scope of the constitution, and all the means which are *appropriate*, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." * * "To use one" (a bank) "must be within the discretion of Congress, if it be an *appropriate* mode of executing the powers of government." * * "But were its necessity less apparent" (the Bank of the United States), "none can deny its being an *appropriate* measure; and if it is, the degree of its necessity, as has been justly observed, is to be discussed in another place."

Pursuing the subject, he added: "When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power:" 4 Wheat. 421, 422, 423.

Judge STORY says: "In the practical application of government, then, the public functionaries must be left at liberty to exercise the powers with which the people, by the constitution and laws, have intrusted them. They must have a wide discretion as to the choice of means; and the only limitation upon that discretion would seem to be that the means are *appropriate* to the end; and this must admit of considerable latitude, for the relation between the action and the end, as has been justly remarked, is not always so direct and palpable as to strike the eye of every observer. If the end be legitimate and within the scope of the constitution, all the means which are *appropriate* and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect:" 1 Story on Const., § 482.

These passages show the spirit in which the amendment is to be interpreted, and develop fully the principles to be applied. Before proceeding further, it will be well to pause and direct

our attention to what has been deemed *appropriate* in the execution of some of the other powers confided to Congress in like general terms.

(1). "The power to lay and collect taxes, duties, and imposts."

This includes authority to build custom houses; to employ revenue cutters; to appoint the necessary collectors and other officers; to take bonds for the performance of their duties; to establish the needful bureaus; to prescribe when, how, and in what the taxes and duties shall be paid; to rent or build warehouses for temporary storing purposes; to define all crimes relating to the subject in its various ramifications, with their punishment; and to provide for their prosecution.

(2). "To regulate commerce with foreign nations, among the several states, and with the Indian tribes."

This carries with it the power to build and maintain light-houses, piers, and breakwaters; to employ revenue cutters; to cause surveys to be made of coasts, rivers, and harbors; to appoint all necessary officers, at home and abroad; to prescribe their duties, fix their terms of office and compensation; and to define and punish all crimes relating to commerce, within the sphere of the Constitution:" *United States v. Coombs*, 12 Peters 72; *United States v. Holliday*, 3 Wall. 407.

(3). "To establish post-offices and post-roads."

This gives authority to appoint a postmaster-general, and local postmasters throughout the country; to define their duties and compensation; to cause the mails to be carried by contract, or by the servants of the department, to all parts of the states and territories of the Union, and to foreign countries, and to punish crimes relating to the service, including obstructions to those engaged in transporting the mail while in the performance of their duty. The mail penal code comprises more than fifty offences. All of them rest for their necessary constitutional sanction upon this power, thus briefly expressed.

(4). "To raise and support armies."

This includes the power to enlist such number of men for such periods and at such rates of compensation as may be deemed proper; to provide all the necessary officers, equipments, and supplies, and to establish a military academy, where are taught military and such other sciences and branches of knowledge as may be deemed expedient, in order to prepare young men for the military service.

(5). "To provide and maintain a navy."

This authorizes the government to buy or build any number of, steam or other ships of war, to man, arm, and otherwise prepare them for war, and to despatch them to any accessible part of the globe. Under this power the Naval Academy has been established: *United States v. Beavan*, 3 Wheat. 390.

These are but a small part of the powers which are incidental and *appropriate* to the main powers expressly granted. It is Utopian to believe that without such constructive powers, the powers expressed can be so executed as to meet the intentions of the framers of the constitution, and accomplish the objects for which governments are instituted. The constitution provides expressly for the exercise of such powers to the full extent that may be "necessary and proper." No other limitation is imposed. Without this provision, the same result would have followed. The means of execution are inherently and inseparably a part of the power to be executed.

The constitution declares that "the senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath to support this constitution." No other oath is required, "yet he would be charged with insanity who would contend that the legislature might not superadd to the oath directed by the constitution such other oath of office as its wisdom might suggest:" *McCulloch v. Maryland*, 4 Wheat. 416.

The Bank of the United States, with all its faculties, was sustained because it was "convenient" and "appropriate" for the Government in the management of its fiscal affairs: 4 Wheat. 316.

Perhaps no measures of the National Government have involved more doubt of their constitutionality than the acquisition of Louisiana and the embargo. Both were carried through Congress by those who had been most strenuous for a strict construction of the constitution. Mr. Jefferson thought the former *ultra vires*, and advised an amendment of the constitution, but expressed a willingness to acquiesce if his friends should entertain a different opinion: 2 Story on the Const. 160.

The second Bank of the United States was a measure of the same class of thinkers. The acquisition of Florida involved

the same question of constitutional power as the acquisition of Louisiana. It was universally acquiesced in, and the constitutional question was not raised.

It is an axiom in our jurisprudence that an act of Congress is not to be pronounced unconstitutional unless the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favor of the validity of the law.

"The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other:" *Fletcher v. Peck*, 6 Cr. 128.

"The presumption indeed must always be in favor of the validity of laws, if the contrary is not clearly demonstrated:" *Cooper v. Telfair*, 4 Dall. 18.

"A remedial power in the constitution is to be construed liberally:" *Chisholm v. Georgia*, 2 Dall. 476.

"Perhaps the safest rule of interpretation after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all lights and aids of cotemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed:" *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters 60.

Since the organization of the Supreme Court, but three Acts of Congress have been pronounced by that body void for unconstitutionality: *Marbury v. Madison*, 1 Cr. 137; *Scott v. Sandford*, 19 How. 393; *Ex parte Garland*, 4 Wall. 334.

The present effect of the amendment was to abolish slavery wherever it existed within the jurisdiction of the United States. In the future it throws its protection over every one, of every race, color, and condition, within that jurisdiction, and guards them against the recurrence of the evil.

The constitution, thus amended, consecrates the entire territory of the republic to freedom, as well as to free institutions. The amendment will continue to perform its function throughout the expanding domain of the nation, without limit of time or space. Present possessions and future acquisitions will be alike within the sphere of its operation. Without any other provision than the 1st section of the amendment, Congress would have had authority to give full effect to the abolition of slavery thereby decreed.

It would have been competent to put in requisition the execu-

tive and judicial, as well as the legislative power, with all the energy needful for that purpose. The 2d section of the amendment was added out of abundant caution. It authorizes Congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded that the judicial power can be invoked. Its office, then, is to repress and annul the excess; beyond that, it is powerless.

We will now proceed to consider the state of things which existed before, and at the time the amendment was adopted, the mischiefs complained of or apprehended, and the remedy intended to be provided for existing and anticipated evils.

When the late civil war broke out, slavery of the African race existed in fifteen states of the Union. The legal code relating to persons in that condition was everywhere harsh and severe. An eminent writer said: "They cannot take property by descent or purchase; and all they find and all they own belongs to their master. They cannot make contracts, and they are deprived of civil rights. They are assets for the payment of debts, and cannot be emancipated by will or otherwise to the prejudice of creditors:" 2 Kent's Com. 281, 282. In a note it is added: "In Georgia, by an Act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia, by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporeal punishment; and it is unlawful for white persons to assemble with free negroes or slaves to teach them to read or write. The prohibitory act of the legislature of Alabama, passed at the session of 1831-2, relative to the instruction to be given to the slaves or free colored population, or exhortation or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slave-holding states, but in Louisiana the law on the subject is armed with ten-fold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language in any public discourse from the bar, bench, stage, or pulpit, or any other place, or in any private con-

versation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves; or who shall be knowingly instrumental in bringing into the state any paper, book, or pamphlet having a like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court."

Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave states. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless. This is borne out by the passages we have given from Kent's Commentaries. Further research would darken the picture. The states had always claimed and exercised the exclusive right to fix the *status* of all persons living within their jurisdiction.

On the 1st of January 1863 President Lincoln issued his proclamation of emancipation. Missouri and Maryland abolished slavery by their own voluntary action. Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still existed in thirteen states. Its simple abolition, leaving these laws and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations, slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt

or cavil upon the subject. The results have shown the wisdom of this forecast. Almost simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "*appropriate*" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act, and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the "inhabitants" of Louisiana and Florida, without reference to race or color, and cannot, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them.

It was passed by the Congress succeeding the one which proposed the amendment. Many of the members of both houses were the same.

This fact is not without weight and significance: *McCulloch v. Maryland*, 4 Wheat. 401.

The amendment reversed and annulled the original policy of the constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects, as to every one within its scope, than the consequences of manumission by a private individual.

We entertain no doubt of the constitutionality of the act in all its provisions.

It gives only certain civil rights. Whether it was competent for Congress to confer political rights also, involves a different inquiry. We have not found it necessary to consider the subject.

We are not unmindful of the opinion of the Court of Appeals

of Kentucky, in the case of *Brown, Appellant, v. The Commonwealth*. With all our respect for the eminent tribunal from which it proceeded, we have found ourselves unable to concur in its conclusions. The constitutionality of the act is sustained by the Supreme Court of Indiana and the Chief Justice of the Court of Appeals of Maryland, in able and well considered opinions: *Smith v. Moody et al.*; *In re A. H. Somers*.

We are happy to know, that if we have erred, the Supreme Court of the United States can revise our judgment and correct our error. The motion is overruled, and judgment will be entered upon the verdict.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MARYLAND.¹

SUPREME COURT OF NEW HAMPSHIRE.²

SUPREME COURT OF NEW YORK.³

ACTION.

Amendment.—A declaration containing the usual money counts, and counts for goods sold and delivered, and for work and labor, and materials found, cannot be amended by introducing a special count upon a lease for unliquidated damages, for breach of the tenants' agreement to carry on the farm in a husbandlike manner, and the like: *O'Burt v. Kinne et al.*, Sup. Ct. N. H.

ARBITRATION AND AWARD.

Independent Awards—Non-Performance by One.—Where arbitrators award something to be done by each party, and the acts are distinct and independent, the one not being a condition precedent to the other, the failure of one party to perform his part of the award, furnishes no excuse for the other; and cannot be set up as a defence to a suit against him: *Girdler v. Carter*, Sup. Ct. N. H.

Where, in a submission between a landlord and tenant, it is awarded that the landlord shall, at a day named, have a certain cow and calf, it was held that the title to them passed by force of the award, without any further act by the tenant: *Id.*

¹ From N. Brewer, Esq., Reporter; to appear in 23 Md. Rep.

² For these notes of very recent decisions we are indebted to the judges of the court. The volume in which they will be reported cannot yet be indicated.

³ From Hon. O. L. Barbour; to appear in Vol. 48 of his Reports.

BILLS AND NOTES. See *Husband and Wife*.

Signature by Mark.—A note signed by a mark, may be valid against the signer, though there be no subscribing witness: *Willoughby v. Moulton*, Sup. Ct. N. H.

Where a note purporting to be signed by the defendant by mark, without a subscribing witness, is specially declared on, if the signature is not denied under the 44th rule of court, it will be considered as admitted to be a genuine signature: *Id*.

What is a Note.—A promissory note or bill, to come within the rules for the protection of the holders of mercantile paper, must be payable absolutely at some period, not depending on a contingency, nor payable out of a particular fund: *Skillen v. Richmond*, 48 Barb.

An instrument was drawn in the usual form of a promissory note, except the following clause, viz. "payable out of and from my separate property and estate, with interest payable quarterly: *Held*, that the instrument was not affected by any of the above rules; the words used not referring to a particular fund, but to the whole estate of the maker. Individual promises are always payable from the separate estate of the maker: *Id*.

Held also, that whether the instrument was subject to the rules of law governing mercantile paper or not, evidence to show an agreement, contemporaneous with the making or indorsement of the instrument, to extend the time of payment, was not admissible in an action by the holder against the maker and indorser: *Id*.

CONTRACT.

Fraud—Rescission.—If one party to a contract has been defrauded by the other, he may avoid and rescind the contract, or not, at his election: *Willoughby v. Moulton*, Sup. Ct. N. H.

But if he elects to rescind, he must do so in reasonable time after the fraud is discovered, and must restore or offer to restore whatever he has received under the contract: *Id*.

Construction of—Sales by Trustees in Chancery—Notice—Caveat Emptor—Mistake.—Purchasers from a trustee in chancery sought by petition an abatement of the purchase-money, on the ground of a deficiency of 53 acres in the quantity of land, and defects in certain machinery purchased, which had been advertised and described by the trustee as "that valuable cotton factory known as Phoenix Factory, with 187 acres of land, more or less, attached thereto," with further representation that "the machinery is in good running order, and now in use." The petition contained no allegation of fraud against the trustee, actual or constructive: *Held*,

1. That the terms used in describing the *quantity* of the land have acquired a legal meaning in this state, which is supposed to be known to all purchasers.

2. That by the terms "*more or less*" in the advertisement, the purchasers were notified that quantity did not enter into the essence of the contract, and they were warned to ascertain the quantity at their own risk (see 15 Md. Rep. 559; 2 Gill Rep. 128; 3 Md. Ch. Dec. 26; 9 Gill 451, cited by the court).

8. Trustees will not be permitted to make representations which are untrue, knowing them to be so, or which they have no reason to believe to be true; but if acting in good faith, they commit mistakes, such mistakes will not prejudice sales made by them more than those made by other vendors.

4. There is no relation of confidence and trust between the trustee and a purchaser; on the contrary, the doctrine "*caveat emptor*" applies to all sales by trustees, acting under decrees of Courts of Equity (see 7 Md. Rep. 342, cited by the court): *Slothower v. Gordon*, 23 Md.

CORPORATIONS.

Action by Receivers.—An action may be maintained by the receivers of an insolvent corporation, against individuals, some of whom are stockholders and some of whom are creditors of the company, to recover from the stockholders a dividend declared on its capital stock and received by them; where it is averred in the complaint that such dividend impaired the capital; that some of the defendants as creditors are suing the stockholders to recover from them such dividends; and that the funds so misappropriated are required to pay the debts of the corporation: *Osgood et al. v. Layton et al.*, 48 Barb.

CRIMINAL LAW.

Stealing from a Warehouse.—A building 21 feet by 15, placed on a market garden and used for storing the tools and agricultural implements, and the manures used there, and such seeds as were sown in the garden, is not a warehouse nor a granary within the meaning of the statute, which punishes as a distinct offence stealing in a warehouse or granary after entering in the night-time, or breaking and entering in the day-time: *State v. Wilson*, Sup. Ct. N. H.

DEBTOR AND CREDITOR. See *Homestead*.

Partnership Debtor—Retiring Partner—Notice to Creditor.—Where evidence has been received, and upon doubts of its competency being expressed by the court, the party offering it says he will withdraw it, and no objection is made by the judge, it will be taken to be withdrawn with his assent, and the verdict will not, ordinarily, be disturbed: *Zollar v. Jaurvin*, Sup. Ct. N. H.

A person accustomed to deal with a trading firm will hold a retiring partner for a debt contracted after such retirement, unless such person had actual notice of it, or was put upon inquiry: *Id.*

Notice in the gazette is not notice to a person accustomed to deal with the firm, unless brought to his knowledge, and even if he be in the habit of taking the same gazette, it is not notice as matter of law: *Id.*

Nor will the registry of a mortgage by the remaining member of the firm to the retiring partner, even of goods like those of the firm, or even if brought to the knowledge of the creditor, put him, as matter of law, upon inquiry: *Id.*

The fact that the creditor had the means of knowledge, and with reasonable diligence might have ascertained the dissolution, will not charge him, unless the circumstances were such as to put him upon inquiry: *Id.*

EQUITY.

Bill by Sheriff.—Where goods are attached and sold on mesne process, and the purchaser pays the price to the creditor, who recovers a judgment for an amount sufficient to absorb the whole; and the sheriff has no other claim upon the purchaser than as trustee for such creditor, a bill in equity will lie to compel an application of the amount so paid to the claim of the sheriff: *Barker v. Barker*, Sup. Ct. N. H.

HOMESTEAD.

Sale by Execution-Creditor.—A creditor cannot lawfully seize and sell on execution his debtor's right of redeeming the family homestead, or an interest therein, where its value does not exceed \$500: *Tucker v. Kenniston*, Sup. Ct. N. H.

If it exceeds that sum, the officer, upon due application must set out the homestead, before he can make sale of any interest therein, and then can proceed only against the surplus: *Id.*

If, after such application, the officer, without setting out the homestead, undertakes to dispose of it, a court of equity will interfere by injunction, upon the ground that it will create a cloud upon the debtor's title: *Id.*

HUSBAND AND WIFE.

Divorce—Imprisonment as a Cause.—In the statute which enumerates the causes of divorce, the term "the state prison," is limited in meaning to the prison established and maintained by this state at Concord, and does not include a prison in another state, though called there "the state prison:" *Martin v. Martin*, Sup. Ct. N. H.

Conviction and imprisonment in another jurisdiction is not a cause of divorce in this state: *Id.*

Promissory Note of Wife.—A married woman is liable upon her promissory note given for the price of neat stock purchased by her during marriage for the use of a farm of which she was seised to her sole and separate use: *Batchelder v. Sargent*, Sup. Ct. N. H.

Conveyance by Husband to Wife.—The deed of the husband in consideration of love and affection, in which he covenanted to stand seised of a farm to his own use during his life, then to the use of his wife during her life, and then to the use of the son, the defendant, for ever, is good to vest the estate in the wife on the death of the husband: *Leavitt v. Leavitt*, Sup. Ct. N. H.

Upon the death of the husband, his administrator is not entitled to the possession of the farm as against the wife, unless the estate be actually insolvent; and a decree of insolvency alone is not sufficient: *Id.*

Such a settlement is good if the covenantor was not embarrassed, but retained ample means to pay all his existing debts, and it was made in good faith; and, therefore, the administrator will not be entitled to dispossess the wife, by showing a decree of insolvency; that some debts due when the deed was made, had been presented against the estate; and that the personal estate is not sufficient to pay all the debts: *Id.*

A verbal agreement between the wife, after the husband's death, and her son, that they shall live together on the farm during her life, and

that he shall carry it on, and that they shall pay the debts of the estate; and an entry and possession by him under such agreement, creates a tenancy at will, from year to year: *Id.*

Therefore a notice to quit of less than three months is not sufficient to terminate such tenancy: *Id.*

The notices prescribed by the act, known as the Landlord and Tenant Act, are intended to take the place of those required at common law, and apply in actions at common law equally as in proceedings under that statute: *Id.*

A notice not naming the day when the tenant is required to yield up the possession, seems not to be in accordance with the statute: *Id.*

Writ of Entry by.—Husband and wife should join in a writ of entry to recover possession of land which was conveyed to them both during their natural lives: *Wentworth and Wife v. Remick*, Sup. Ct. N. H.

INSURANCE (MARINE).

Time Policies—Deviation.—In time policies, the rules as to deviation do not apply to the same extent as in voyage policies. Under time policies, the mere intention to deviate is not sufficient to avoid the policy, although during the period of the violation of the warranty, the vessel is not covered by the policy: *Bearns v. The Columbian Insurance Company*, 48 Barb.

JURY.

Costs—Verdict—Surplusage.—A jury have no power to award costs in their verdict. But if they attempt to do so, that portion of their verdict will be treated as void, and rejected as surplusage, and will not affect the residue of the verdict: *Tucker and Stiles v. Cochran*, Sup. Ct. N. H.

So also, if the jury in returning a special verdict find a fact which is entirely immaterial, that portion of the verdict may be rejected as surplusage: *Id.*

When a verdict either general or special, does not find the issue raised by the pleadings, as it should do, yet if it is such a verdict as the court can clearly understand, and such that a verdict can be concluded out of it to the point in issue, the court will mould and work it into form according to the justice of the case: *Id.*

LANDLORD AND TENANT. See *Husband and Wife*.

Summary Proceedings to remove Tenant.—The affidavit by which summary proceedings for the removal of a tenant are initiated, need not state the date or duration of the lease. The facts stated in such affidavit, and not denied by the affidavit of the tenant, are admitted: *The People ex rel. Teed v. Teed*, 48 Barb.

Where the facts put in issue are the ownership of the premises, and the hiring thereof to the tenant, proof of a conveyance to the landlord, and the payment of rent to him by the tenant, establishes both of these issues against the tenant: *Id.*

If the nature of the hiring was such that the landlord could not take the remedy by summary proceedings, the tenant must set up that defence: *Id.*

PARTITION.

By Parol.—A partition of land by parol is invalid, notwithstanding the division line was marked and monuments set up, and a several occupation in accordance with it for several years: *Ballou v. Hall*, Sup. Ct. N. H.

So such several occupation for a period less than twenty years, will not be proof of the assent of one tenant in common, to a conveyance by the other of one of the parcels so marked out, and which was assigned to him for his share: *Id.*

Such a conveyance, although it can have no effect upon the rights of the other tenant in respect to partition, will entitle the grantee to stand in the place of the grantor in respect to the possession and profits of that parcel of the common land: *Id.*

Trover cannot be maintained by one tenant in common against the other, for taking all the crops and merely withholding the whole from him: *Id.*

RAILROAD.

What Property may be considered Part of.—For purposes of taxation, wood, timber, logs, and lumber, owned by a railroad corporation, and distributed along its line for present use in operating and repairing such road, are to be deemed a part of the railroad, and subject to be taxed in that form by the justices of the Supreme Judicial Court: *Fitchburg Railroad v. Prescott et al.*, Sup. Ct. N. H.

And therefore, such articles cannot be lawfully taxed in the towns where they may happen to be, although exceeding in value the sum of \$50: *Id.*

STAMPS.

On Process issued by Justices.—The Act of Congress passed in 1864, entitled "An act to provide internal revenue for the support of the government," was intended to impose a stamp duty upon all writs and other process issued by a justice of the peace, when the amount claimed is \$100 or over. It therefore embraces a summons: *Cole v. Bell et al.*, 48 Barb.

Objection for want of, how waived.—Where the notice of appeal from a judgment of a justice of the peace, though specifying several grounds of error, did not specify the want of a stamp upon the summons as one of them: *Held*, that as the objection involved a question of jurisdiction, it was not waived by the notice of appeal, but could be raised at any time during the progress of the action: *Id.*

On Notice of Appeal.—No objection can be urged on the argument of an appeal to the notice of appeal, because no revenue stamp was put upon it. Such objection can only arise on a motion to dismiss the appeal: *Id.*

TRUSTEE.

Attachment of Funds in his hands.—A sale of certain real estate was made by a trustee under decree of court. The proceeds of sale, to which in part the appellee was entitled, were duly reported for distribution, but before his share was ascertained by the statement and ratification

of the final account, the appellants, being his creditors, sued out attachments for the amount of their respective claims, and caused them to be laid in the hands of the trustee. Counsel, professing to act for the appellee, and for the protection of his interest in the fund derived from the sale, entered their appearance for the garnishee, and finally consented to judgments of condemnation. The appellee claimed that his share of the proceeds of the sale as per the final account, should be paid him regardless of the claims of the appellants on their judgments of condemnation. *Held*, that the general rule, that funds in the hands of a trustee in equity are not liable to attachment and condemnation before the statement and ratification of a final account, appears to rest altogether on jurisdictional considerations sufficient for the defence of a trustee as garnishee, as well as for the protection of the funds in his hands from condemnation; but it is manifest that these are purely matters of defence of which the trustee should avail himself by motion, pleadings, or proof at some stage of the attachment proceeding before final judgment: *Groome, Adm'r. of Keck et al., v. Lewis*, 23 Md.

It is not necessary, however, that a trustee should plead such matters specially, but they should be so disclosed that the court having jurisdiction of the attachment may take notice of them before the cause is concluded by a judgment: *Id.*

Where, in proceedings in attachment, there was nothing to show that the garnishee made any defence whatever, but assented to the judgments of condemnation, those judgments, like others pronounced by courts of competent jurisdiction, must be respected as final and conclusive on the rights ascertained and established by them: *Id.*

The fact that the garnishee had a good defence, or that he was clothed with a privilege sufficient to protect him from liability to the attaching creditors, cannot be inquired into here for the purpose of setting aside the judgments or releasing him from their proper legal effect: *Id.*

The general rule above cited, is not a device for the benefit of debtors, nor can it be said to contemplate in any way the protection of their interests in trust funds from the appropriate remedies of their creditors, nor can they derive any incidental advantage from the rule, except in cases where the existing facts or circumstances are such as to justify its application; the rule cannot be applied after there has been a final account and an order to the trustee to pay accordingly: *Id.*

It cannot be doubted that an attachment, laid in the hands of a trustee before a final account, would be good, if at any time before trial or judgment the share of the fund in hand, belonging to the debtor, is ascertained by a final account: *Id.*

WAY.

Conditions of Grant.—Where a farm was conveyed with the free and uninterrupted use and privilege of passing and repassing over other land of the grantor, in the usual passage way, and proof was offered that such way had been used with gates and bars for forty years, and up to the time of the grant; and that such gates and bars were necessary to the convenient use of the grantor's remaining land: It was *held* that this must be taken to be a grant of the way as there existing, subject to gates and bars, and a right to use it without other or further impediment: *Garland v. Turber et al.*, Sup. Ct. N. H.

THE
AMERICAN LAW REGISTER.

MARCH, 1868.

AMOS DEAN.

PROFESSOR AMOS DEAN, of the Law Department of Albany University, and one of the editors of this magazine, died suddenly on the 26th of January last. Early in the winter he had a fall, by which his right arm and shoulder were badly fractured, and he did not seem to recover from the effects, although his general health was not impaired until a few days before his death.

Mr. Dean was born in Barnard, Vermont, January 16th 1803. At that time his native town was small, and inhabited chiefly by adventurous pioneers, who devoted themselves to the cultivation of the rugged soil. His father, Nathaniel Dean, had come to Barnard at an early day from Hardwick, Mass., and was, like most of his neighbors, a farmer. There were no facilities for learning beyond the rudimentary education of the village school-house, but the subject of this notice evinced, while still a boy, an eager desire for knowledge, and by his diligence and energy availed himself of his little opportunities so well that he was able to enter at an early age the Vermont University.

From this, however, he soon transferred himself to Union College, where he graduated in 1826.

After determining upon the law as his profession he went to Albany, and entered the office of his mother's brother, the late JABEZ D. HAMMOND, who was then in partnership with Judge
• ALFRED CONKLING. He was admitted to practice at the May
Vol. XVI.—17 (257).

Term of the Supreme Court in 1829, and from that time engaged assiduously and earnestly in his profession. For several years, and during the earlier period of his practice, he was associated with AZOR TABER, then recognised as one of the most eminent lawyers of that part of the state. The firm possessed an extensive practice and attained an honorable standing.

Professor DEAN, however, was more fond of acquiring and imparting knowledge than of the routine, and detail, and sharp encounters of active practice.

Without any pretensions to eloquence, he was a clear, direct, and forcible speaker, and might have attained a fair measure of success before juries but for his tastes which made the duties of an advocate especially disagreeable to him. He soon began to confine himself to the office and the counsel-room, where he became eminent for learning, prudence, and wisdom, and these qualities, added to unimpeachable integrity, brought him clients and fame.

Professor DEAN, however, was chiefly eminent as a scholar. He was such by education, by habit and taste. He had an extraordinary aptitude for scientific and historical learning, and, blended with his knowledge in the law, equal stores of learning in other favorite departments. He took great interest in young people, and especially in the cause of popular education, to which he gave a great deal of time and attention during his whole life. In 1833 he conceived the plan of establishing societies of young men for their mental improvement, and gathering about him a few friends, established the "Albany Young Men's Association," the model upon which thousands of similar associations have since been formed throughout the country. Upon the organization of the association he was elected its first president, devoting much time and labor to its affairs for several years, and retaining an affectionate interest in its proceedings and welfare during the rest of his life.

In 1838 he was associated with Doctors MARCH and ARMSBY in establishing the Albany Medical College, and from that time to 1859 held in it the position of Professor of Medical Jurisprudence. He was also, at the time of his death, a trustee of the Dudley Observatory and of the Albany Female Academy.

The Law Department of the University of Albany was established by his exertions mainly, and he became one of its pro-

fessors as well as its active manager. His special department was the law of personal property, contracts, and commercial law, and to his duties in this professorship his chief labors were given during the latter years of his life. The school prospered, and has at this time a high reputation throughout the country, a very large part of which is due to the character and efforts of Professor DEAN.

He was a man of unwearied industry, and attained some position as an author. In early life he delivered a series of lectures upon the subject of Phrenology, which were subsequently embodied in a book. He was the author at an early age of a "Counting-House Manual of Law," and at various times wrote addresses and lectures upon subjects of public interest. In 1833, he delivered the annual address before the Albany Institute on the "Philosophy of History." He delivered several lectures before the Young Men's Association during the first two years of its existence. He also delivered a eulogy upon the life and character of Jesse Buel, before the State Agricultural Society, and an annual address before the Senate of Union College.

In 1861 he became one of the editors of this journal, and wrote from time to time, leading articles on various subjects, such as Unsolved Problems of the Law as embraced in Mental Alienation, Interpretation and Construction of Contracts, Domicil, Application of Payments, &c., all of which were marked by his usual careful industry, accuracy, and simplicity of style.

As a lawyer, Professor DEAN's reputation will rest principally upon his work on Medical Jurisprudence, an early text-book, written before the subject had attracted the great attention which it is now receiving from both the legal and medical professions. Although in some measure superseded by later works, this is still a standard text-book, and has made the author's name familiar to all the courts of this country.

In literature outside of his profession, his chief claim to notice will be his yet unpublished work on the History of Civilization. Upon this he had been engaged for twenty years with the greatest interest and assiduity. His design was to make a compendious history of civilization, both in its facts and its philosophy, giving in systematic order the substance and significance of the whole course of human progress; and the amount of time, labor, and learning that he had devoted to it gave assurance of a work of

usefulness and value. Whether it was in condition to be given to the world by another hand, the present writer is ignorant.

As a writer, Professor DEAN was characterized by industry, accuracy, and great carefulness in the examination of authorities, and by clearness and unambitious simplicity of language in expressing his conclusions. He was not a great author, nor a great lawyer, but he held a fair rank in that honorable class of the profession who are learned, prudent, and trusty counsellors in the affairs of men.

The proprieties of the occasion will be sufficiently served in the present notice, by adding, that Professor DEAN was marked by ingenuousness and sincerity, by freedom from all obtrusive self-assertion, by extraordinary kindness of heart, and simplicity of manners. He was genial and confiding in his social relations, earnest and faithful in the discharge of all the duties of his various positions. His personal character was unblemished by any vices. He was constantly putting forth influences for good upon all classes of the community, and especially upon young men, who, at the threshold of active life, were in need of direction, encouragement, support, and instruction. By the great number of this class with whom he was in one way or another connected, and by a very large circle of personal friends, his death is felt as a great loss.

J. T. M.

RECENT AMERICAN DECISIONS.

Supreme Court of Appeals of Virginia.

WILLIAM P. JETT v. THE COMMONWEALTH OF VIRGINIA.

Passing a counterfeit note of a national bank is an offence for which an indictment will lie in a state court, under the laws of the state.

There is nothing in the relations of the state and Federal courts or in the nature of the jurisdiction itself, which makes the jurisdiction of the United States courts to punish the act of passing counterfeit national bank notes, necessarily exclusive.

Nor is it made so by Act of Congress.

The concurrent jurisdiction of the national and state courts considered and discussed. Per JOYNER, J.

THIS was a writ of error to the Circuit Court of *Pittsylvania county*.

The plaintiff in error was prosecuted in the court below and

convicted under the statute of Virginia (Code of 1860, chap. 193, sec. 3), of the offence of uttering and attempting to employ as true a forged bank-note purporting to be a note of The Fourth National Bank of Philadelphia.

A motion was made to arrest the judgment on the ground that the courts of the state have no jurisdiction to entertain a prosecution for that offence.

The motion was overruled and judgment entered on the verdict, whereupon the defendant took this writ of error.

C. E. Dabney and E. Barksdale, Jr., for plaintiff in error.—The prisoner was indicted under the law of Virginia making it forgery to make or utter any counterfeit “note or bill of a banking company.” The offence charged was uttering a counterfeit note of The Fourth National Bank of Philadelphia, a bank formed under the authority of the Act of Congress, of June 3d 1864. This act provides for the punishment of the offence of uttering forged notes of such banks.

The Act of Congress of September 24th 1789, known as the Judiciary Act, provides that the Circuit Courts of the United States “shall have exclusive cognisance of all crimes and offences cognisable under the authority of the United States,” unless the laws of the United States otherwise direct.

When Congress declares any act to be an offence against the United States, and provides for its punishment as such, it is not competent for the courts of a state to entertain a prosecution founded upon the same act, under a law of the state making it an offence against the state, unless the express consent of Congress has been given for that purpose. Congress has not given such consent in respect to the offence of uttering forged notes of the national banks.

The opinion of the court was delivered by

JOYNES, J.—The act described in the indictment is simply a cheat, practised or attempted by one citizen of Virginia upon another, by means of a forged paper purporting to be a bank-note. Whether the forged paper by which such a cheat is effected or attempted, purports to be the note of a state bank or the note of a national bank, the offence pertains equally to those matters of internal police, which, by the acknowledged theory of our insti-

tutions, belong generally to the jurisdiction of the states. This jurisdiction of the states constitutes a cardinal feature of our system of government. Whether in respect to the particular offence described in the indictment, it is superseded and displaced by the paramount jurisdiction of the United States, is the question now before us. It is a grave and important question. It involves the relative rights and powers of the state and Federal governments, and the rights and liabilities of the citizen in respect to both. And is also a question of practical importance. The authorities of the state are dispersed throughout all parts of the Commonwealth, and it is reasonable to suppose that the detection and punishment of this class of offences will be more effectually secured by them than they can be if confided only to the authorities of the United States, who are few in number and confined to a few localities. If, however, the jurisdiction over this class of offences belongs exclusively to the United States, we ought not to usurp it, and have no disposition to do so. If, on the other hand, it belongs to the state, we have no right to surrender it. In the language of the Supreme Court, "the duties of this court to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The Constitution, therefore, and the law are to be expounded without leaning the one way or the other:" *Bank of U. S. v. Deveaux*, 5 Cranch Rep. 87.

It is not necessary in this case to consider at large the construction of section 2, article 3 of the Constitution of the United States in relation to the judicial power, or the cases in which the jurisdiction of the courts of the United States is exclusive, or those in which a concurrent jurisdiction may be exercised by the courts of the several states. The rules by which these two classes of cases are to be discriminated, do not appear to be precisely determined by the decisions of the Supreme Court, as may be seen from the case of *The Moses Taylor*, decided at the last term of that court and reported in 4 Wallace's Rep. 411. That case, however, affirms it to be a general rule, that while the judicial power of the United States is, in some cases, unavoidably exclusive of all state authority, it may be made so in all others at the election of Congress.

It cannot be questioned that the class of offences to which that now before us belongs, was within the jurisdiction exercised by

the states before the adoption of the Federal Constitution. The jurisdiction over this class of offences still belongs to the states, unless they surrendered or lost it in the formation of that Constitution. To show that they did so, it is not enough, according to the acknowledged rule of construction, to show that jurisdiction over the same class of offences was granted to the United States by the Constitution. To deprive the states of an authority or jurisdiction which they had before the adoption of the Constitution, there must be either an express grant of exclusive authority or jurisdiction over the same subject or class of cases to the United States; or there must be a grant of authority or jurisdiction to the United States not in terms exclusive and an express prohibition against the exercise of like authority or jurisdiction by the states; or there must be authority or jurisdiction granted to the United States, to which a similar authority or jurisdiction in the states would be absolutely and totally contradictory and repugnant: *Federalist*, No. 32; *Id.*, No. 82; *Houston v. Moore*, 5 Wheat. Rep. 1; 1 Kent Com. 400; Story on Constitution, §§ 436-447.

In the present case there is no express grant of exclusive jurisdiction to the United States, nor any express prohibition to the states. If, therefore, the states have lost their ancient jurisdiction over any offence of this class, it must be because jurisdiction over the offence has been given to the United States to which a like jurisdiction in the states would be wholly contradictory and repugnant.

Congress having, as must be assumed, authority to establish the system of national banks, had authority to protect their circulation from being discredited by counterfeits, in order to secure the usefulness of the system. When, therefore, the forged note employed in effecting a cheat, purports to be the note of a national bank, Congress has a right to declare the act of uttering or attempting to pass such note to be an offence against the United States, and has accordingly done so. Literally speaking, the Act of Congress and the statute of the state punish the same identical act, namely, the act of uttering or attempting to pass as true the forged note. But the two statutes aim at the accomplishment of different objects; the authority under which they were enacted is derived from different sources, and though the offence which each

of them punishes is comprised in one and the same act, there is really an essential difference in the character of the two offences.

There is nothing peculiar in respect to the law of the state or to the offence now in question, to render the jurisdiction of the state courts, under the law of the state, incompatible with that of the Federal courts under the Act of Congress, if it would not be so, upon general principles, in all cases whatsoever. The law of the state is in entire harmony with the Act of Congress, and seeks, though for different reasons and in pursuance of a different policy, to effect the same object, to wit, the suppression of counterfeits.

A conflict of jurisdiction between the Federal and state courts may occur under different circumstances. Thus, an Act of Congress and the statute of a state may declare the same identical act to be an offence; as for example, the act of counterfeiting the coin, or the act of uttering and passing counterfeit coin. In other cases the Act of Congress and the law of the state are aimed at different offences, but in doing an act prohibited by the Act of Congress, the offender also does an act prohibited by the law of the state. For instance, a party may commit the offence of robbing the mail, and commit, at the same time, the offence of assault and battery. In the discussions to which this subject has given rise, these and probably other distinctions have been claimed to make a difference in the principle governing the cases. At an early period after the adoption of the Constitution, an eminent jurist expressed the opinion that a man could not, by doing any one act, violate, at the same time, the laws of the United States and the laws of any one of the states, and that where a party, in the course of doing an act which violates a law of the United States, also does an act which violates the law of a state, he really commits but one offence, and that the offence against the United States, on the ground that the greater crime includes and swallows up the less: Letter of Judge CHASE to the Governor of Maryland, October 6th 1794, *Journal of Jurisp.* 262. An able writer, at a much more recent period (1845), advocated a similar view in respect to certain offences, on the ground that an offence against one state ought to be considered as merged in an offence against all the states: 4 *Am. Law Magazine* 318, 334-340. Others, while admitting that the same act may be declared an offence both by Act of Congress and by state law, and punished

under either one, have contended that a judgment of conviction or acquittal under either one may be pleaded in bar of a prosecution under the other, and that according to the rules of comity which prevail between concurrent jurisdictions, the one which first attaches should be allowed to proceed to judgment: Per WASHINGTON, J., *Houston v. Moore*, 5 Wheat. 1; Rawle on Const. 205-206.

Others again have contended, as a general proposition, that when any act has been declared by Congress to be an offence against the United States, it is incompatible and repugnant for a state legislature to declare the same act to be an offence against the state. This has been maintained chiefly on the ground that the offender would be thereby exposed to be twice punished, or twice put in jeopardy for the same offence. This view was maintained by the Supreme Court of Missouri, in the case of *Mattison v. The State*, 3 Mo. R. 421, and by Mr. Justice McLEAN, in the two cases hereafter cited from 5 Howard and 14 Howard.

The conflict and variety of opinions on this subject may be further seen by reference to the following cases: *State v. Antonio*, 3 Brevard's R. 562; *State v. Tutt*, 2 Bailey's R. 44; *Commonwealth v. Fuller*, 8 Metc. R. 313; *State v. Wills*, 2 Hill's S. C. R. 657; *State v. Harlan*, 1 Dougl. Mich. R. 207; *Rouse v. State*, 4 Ga. R. 136; *Hendrick's Case*, 5 Leigh's R. 709.

I have made this brief allusion to some of the conflicting views which have been entertained on this subject, in order to show the confusion and perplexity in which it has, until recently, been involved, and the importance and value of the decisions of the Supreme Court, to which I shall now refer.

The first of the cases alluded to is that of *Fox v. State of Ohio*, 5 Howard Rep. 410, decided in 1847.

The precise question in that case was, whether the state of Ohio had authority to provide by law for punishing the offence of passing counterfeit coin. The case was very fully and ably argued. Mr. Justice McLEAN was of opinion that such a power could not be exercised by Ohio, because it would be incompatible with the exercise of the same power by the United States, which he thought clearly existed. But all the other judges concurred in holding that the state possessed the power.

There are some expressions in the opinion in that case which throw doubts upon the power of Congress to provide for punishing

the offence of passing counterfeit coin. But the case was not put on that ground, and subsequent parts of the opinion affirm the right of the state to provide for punishing the act of passing counterfeit coin as an offence against the state, even though Congress should provide, and have the right to do so, for punishing it as an offence against the United States. The court further held, that if the party should be punished twice for the same act, he could not complain that the 5th article of the Amendments to the Constitution had been violated, which provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb, but that, in point of fact, the benignant spirit in which both the state and Federal systems are administered would preclude all danger of such double convictions, unless it might be in cases of special enormity or demanding unusual rigor.

In *United States v. Marigold*, 9 Howard Rep. 560, it was held, that Congress had the power to protect the coin by providing for the punishment of persons who bring counterfeit coin into the United States with intent to pass it, and also for the punishment of persons who utter and pass any such counterfeit coin. The court expressly re-affirm what it was said was laid down in *Fox v. State of Ohio*, "with a view of avoiding conflict between the state and Federal jurisdictions," namely, "that the same act may, as to its character and tendencies, and the consequences it involves, constitute an offence against both the state and Federal governments, and may draw to its commission the penalties demanded by either, as appropriate to its character in reference to each."

The same principle was again affirmed in *Moore v. People of Illinois*, 14 Howard Rep. 13. That was an indictment in a court of the state of Illinois, under a statute of that state, for harboring a fugitive slave. It was contended that the statute of the state was void because it provided for the punishment of the same act for which, by the Act of Congress of 1793, the offender was subjected to a penalty of \$500, to be recovered by the owner of the slave, and that so the party would be subject to a double punishment for the same offence. The court held, that the two statutes did not provide for the punishment of the same identical acts; but that even if they had done so, the consequences insisted on would not have followed. The language of the court on this point is very clear and emphatic. "But admitting," said

the court, "that the plaintiff in error may be liable to an action, under the Acts of Congress, for the same act of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offence. An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act, and may be said, in common parlance, to be twice punished for the same offence. Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for the infraction of the laws of either. The same act may be an offence [under], or transgression of, the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment, and the same act may be also a gross breach of the peace of the state, a riot, assault, or murder, and subject the same person to punishment under the state laws for misdemeanor or felony. That either or both may, if they see fit, punish such an offender, cannot be doubted. Yet it cannot be truly averred, that the offender has been twice punished for the same offence, but only that, by one act, he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other. Consequently this court has decided, in *Fox v. The State of Ohio*, that a state may punish the offence of uttering or passing false coin, as a cheat or fraud practised on its citizens, and in the case of *The United States v. Marigold*, that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States."

This case was decided in 1852, since which time the question does not appear to have been raised in the Supreme Court.

In the case of *The United States v. Amy*, a slave prosecuted for the offence of robbing the mail, and tried in the Circuit Court of the United States for the Eastern District of Virginia, before Chief Justice TANBY and Judge HALYBURTON, at May Term 1859, the Chief Justice laid down the same principle in very strong terms as the clear and settled law. He said: "In maintaining

the power of the United States to pass this law [punishing a slave with imprisonment for robbing the mail], it is, however, proper to say, that as these letters, with the money in them, were stolen in Virginia, the party might undoubtedly have been punished in the state tribunals, according to the laws of the state, without any reference to the post-office or the Act of Congress, because, from the nature of our government, the same act may be an offence against the laws of the United States and also of a state, and be punished in both. This was considered and decided in the Supreme Court of the United States in the case of *Fox v. State of Ohio*, and in the case of *United States v. Marigold*, and the punishment in one sovereignty is no bar to his punishment in the other.

“Yet in all civilized countries it is recognised as a fundamental principle of justice that a man ought not to be punished twice for the same offence. And if this party had been punished for the larceny in the state tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a *nolle prosequi* or granting a pardon:” Richmond Law Jur. pp. 201, 202.

These principles must be regarded as the settled doctrine of the Supreme Court. They ought to set at rest the disputed questions to which they apply. They appear to me to be reasonable and just. But if I thought otherwise, I should feel no hesitation in yielding to the decisions of the Supreme Court, on a question of this character, as authority binding upon me. They are in conformity with the decision of the General Court of Virginia in *Hendrick's Case*, 5 Leigh Rep. 707. That was a prosecution for passing a forged check, purporting to be a check of the cashier of the Bank of the United States. In delivering the opinion of the court, Judge DANIEL said: “It was urged by the prisoner's counsel that the judgment ought to have been arrested, on the ground that the courts of Virginia ought not to punish criminally any forgery of the notes, bills, or checks of or upon the Bank of the United States, because this is an offence punishable by the courts of the United States, and if a state court, which cannot oust the courts of the United States of their jurisdiction, should proceed, it might so happen that a man might be punished twice for the same offence. The answer to this is, that the law of Virginia punishes the forgery not because it is an

offence against the United States, but because it is an offence against this Commonwealth, committed within its limits, and the punishment of it is designed for the protection of our own citizens."

The Act of Congress by which the forging of checks, &c., of the Bank of the United States was made punishable as an offence against the United States, contained a provision to the effect, that nothing therein should prevent the courts of the several states from taking cognisance of the same act as offences under state laws. But that proviso did not, as is conceded on all hands, confer jurisdiction upon the state courts, and is immaterial, therefore, to the purpose for which I now cite this case. The only effect claimed for such a proviso, as we shall see hereafter, is, that it relinquishes as to the particular class of offences, the exclusive jurisdiction of the courts of the United States, under the provisions of the Judiciary Act, and allows the courts of the states to exercise a jurisdiction which they might have exercised, if not prohibited by the grant of exclusive jurisdiction to the courts of the United States by the Judiciary Act.

This case, therefore, and every other which holds that a prosecution may be maintained in a state court under a state law, for the offence of counterfeiting the coin, or for passing counterfeit coin, or for any other offence against the coin provided for by Act of Congress, or for the offence of forging a note or check of the Bank of the United States, or of passing such forged note or check, is an authority for the proposition which I have been maintaining, that there is no incompatibility or repugnance between the jurisdiction of the courts of the United States to punish a man for a particular act as an offence against the United States, under an Act of Congress, and the jurisdiction of the courts of a state to punish the same man for the same act as an offence against the state, under the laws of the state. The cases of this sort are numerous, and many of them are cited in a former part of this opinion.

I do not see how the allowance of such a concurrent jurisdiction to the state courts, can lead to any collision between them and the Federal courts, unless it should arise from a disregard of the rule of comity which prevails between concurrent jurisdictions, that the one which first takes cognisance of a subject-matter shall be allowed to proceed without interference by the other: *Taylor v. Carryl*, 20 Howard Rep. 588; *Freeman v. Howe et al.*, 24

Howard Rep. 450. Such a concurrent jurisdiction has long been exercised in respect to certain classes of criminal acts, and I am not aware that it has led to any such collision. We must suppose that the Federal and state authorities will be exercised in good faith without jealousy, and with a view to the general good. So exercised there need be no sort of conflict between them. But if there should be more ground than I think really exists, to apprehend such a collision, it would only present an instance of those "occasional interferences" spoken of in the Federalist, which afford no ground, in the absence of absolute incompatibility and repugnance, for ousting the states of an authority which they exercised before the formation of the Constitution: Federalist, No. 32.

I do not think there is any solid ground for the objection that this doctrine would, in its practical working, lead to injustice and oppression, by subjecting offenders to double punishment for the same act. We must suppose that the criminal laws will be administered as they should be in a spirit of justice and benignity to the citizen, and that those who are intrusted with their execution will interpose to protect offenders against double punishment, whenever their interposition is necessary to prevent injustice or oppression, and that if they should fail to do so, the wrong will be redressed by the pardoning power. We may safely assume that there will be no cases of double punishment hereafter, as I presume there have been none heretofore, except perhaps in cases of great enormity, or in cases attended by some peculiar circumstances, in which the ends of justice could not be otherwise secured.

It is said that the security thus afforded to the liberty of the citizen is altogether too precarious. But it is not more so than in any other case where no absolute rule has been prescribed, which is to govern in all cases. Whenever a power is bestowed which may be exercised or not exercised, according to the discretion of the court, or where the manner or extent of its exercise depends on the discretion of the court, injustice may be done by an abuse of the discretion, and it may not be possible to prevent or to correct it. The law in every such case confides, of necessity, in the integrity and justice of the courts.

It must be remembered, however, that these objections to the practical consequences of allowing such a concurrent jurisdiction

to the state courts, if well founded, do not afford a conclusive argument against the existence of the jurisdiction. They could, at most, only turn the scale if the argument on other grounds left the question in doubt.

I conclude, therefore, that there is nothing in the relation between the state and Federal governments, or in the nature of the jurisdiction itself, which makes the jurisdiction of the courts of the United States to punish the act of passing a forged note of a national bank, as an offence against the United States, necessarily exclusive of the jurisdiction of the state courts to punish the same act as an offence against the state. It remains to consider whether it has been made so by Act of Congress.

As I have said before, the offence in this case belongs to a class over which the states and their courts exercised jurisdiction before the adoption of the Federal Constitution. How far it is competent for Congress to prohibit the state courts from exercising jurisdiction, under state laws, over any such class of criminal acts, by giving exclusive cognisance of them to the courts of the United States, has not been determined by the Supreme Court, and it is not necessary for me to express an opinion on the question. This question was not in the mind of the court when it was said, in *Martin v. Hunter, Lessee*, 1 Wh. Rep. 304 (337), and in *The Moses Taylor*, 4 Wallace Rep. 411, "that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others may be made so at the election of Congress." This is evident from the context of this passage in the former case. The court had just adverted, with approbation, to an argument which had been urged, that it is imperative on "Congress to vest all the judicial power of the United States in the shape of original jurisdiction in the supreme and inferior courts created under its own authority." And immediately after the passage above quoted, and showing its meaning, are the following passages: "No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognisance; and it can only be in those cases where, previous to the Constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the Judiciary Act, and particularly in the 9th, 11th, and 13th

sections, has legislated upon the supposition that in all cases to which the judicial power of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts."

The opinion of Mr. Justice WASHINGTON in *Houston v. Moore*, 5 Wheat. Rep. 1, is relied upon by the counsel for the plaintiff in error, to sustain the proposition that Congress may thus exclude the jurisdiction of the state courts under state laws, and that it did so by the provision of the Judiciary Act giving to the courts of the United States exclusive cognisance of all crimes and offences cognisable under authority of the United States, unless otherwise provided by that act or by some other Act of Congress, so that the express consent of Congress was necessary to enable the state courts to exercise jurisdiction under state laws over acts declared by Congress to be offences against the United States. It does not appear to what extent the views in question received the concurrence of the other judges, one of whom declared in his opinion that the views of the judges composing the majority, coincided in but one thing, namely, that there was no error in the judgment appealed from, and that no point whatever was decided, except that the fine was constitutionally imposed upon the plaintiff in error. Per JOHNSON, J., p. 47.

The single opinion of this eminent judge, however, is entitled to great weight, and deserves further consideration. It must be observed that Mr. Justice WASHINGTON regarded the case then before him as involving the jurisdiction of the state courts to "enforce the laws of Congress," as he said in one place, or, as he said in another place, to "adjudicate in a case which depends on a law of Congress and to enforce it." The case before us, on the other hand, involves the question whether the state courts can take jurisdiction of an offence against the state created by a statute of the state.

Houston, in that case, had been tried by a court-martial of the state of Pennsylvania, under an act of that state passed in 1814, providing that officers and privates of the militia neglecting or refusing to serve when called into actual service in pursuance of an order or requisition of the President of the United States, shall be liable to the penalties defined in the Act of Congress passed February 28th 1795, or to any penalty which may have been prescribed since the date of that act, or to any which might be thereafter prescribed by any law of the United States, and

providing for the trial of such delinquents by a state court-martial, &c. The learned judge, after stating the character of the case in the general terms above quoted, says, that "the offence to be punished grows out of the Constitution and laws of the United States, and is, therefore, clearly a case which might have been withdrawn from the concurrent jurisdiction of the state tribunals."

Proceeding to consider the question whether, as Congress has not given exclusive jurisdiction to courts-martial deriving their authority from the United States, the courts-martial of the state can exercise jurisdiction, the learned judge refers to the doctrine of the Federalist, that Congress "may commit the decision of causes arising upon a particular regulation to the Federal courts only, yet that in any case in which the state tribunals should not be expressly excluded by the acts of the National Legislature, they would, of course, take cognisance of the causes to which these acts might give birth." The judge says that he perceives no objection to this doctrine, so long as the power of Congress to withdraw the whole or any part of those cases from the jurisdiction of the state courts, is, as he thinks it must be, admitted. This part of the opinion has no reference to prosecutions in the state courts for offences against the state under state laws. It has reference to cases arising under Acts of Congress, and affirms the right of the state courts to take cognisance of them, unless the jurisdiction of the courts of the United States is made exclusive. This is sufficiently obvious from the language of the judge. But it will appear perhaps even more clearly from the 82d number of the Federalist, to which the judge refers.

The learned judge then refers to the practice of the general government as confirming this doctrine. He cites the Judiciary Act as showing the opinion of Congress, that a mere grant of jurisdiction generally to the courts of the United States, was not sufficient to vest the exclusive jurisdiction. He then proceeds as follows: "In particular this law grants exclusive jurisdiction to the Circuit Courts of all crimes and offences cognisable under the authority of the United States, except where the laws of the United States should otherwise provide; and this will account for the proviso in the Act of the 24th of February 1807, ch. 75, concerning the forgery of the notes of the Bank of the United States, that nothing in that act contained should be construed to deprive the courts of the individual states of jurisdiction, under

the laws of the several states, over offences made punishable by that act. A similar proviso is to be found in the Act of the 21st of April 1806, ch. 49, concerning the counterfeiting of the current coin of the United States. It is clear that, in the opinion of Congress, this saving was necessary in order to authorize the exercise of concurrent jurisdiction by the state courts over those offences, and there can be very little doubt but that this opinion was well founded. The Judiciary Act had vested in the Federal courts exclusive jurisdiction of all offences cognisable under the authority of the United States, unless where the laws of the United States should otherwise direct. The states could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct conflict with the Act of Congress. But by these savings Congress did provide that the jurisdiction of the Federal courts in the specified cases should not be exclusive, and the concurrent jurisdiction of the state courts was instantly restored, so far as, under state authority, it could be exercised by them." With deference to the authority of this eminent judge, I submit that this reasoning is not satisfactory.

The object of the Judiciary Act was to establish the judiciary system of the United States, and to regulate the jurisdiction of the courts of the United States, as far as this was not done by the Constitution. In respect to crimes, the object was to regulate the jurisdiction of those courts over such crimes as could be prosecuted and punished under the authority of the United States. It was thought by many, and doubtless by the framers of that act, though it has since been settled otherwise, that the courts of the United States might take cognisance of offences at common law, without the authority of an Act of Congress, and hence it was, I apprehend, that they used the general expression, "Cognisable under the authority of the United States." But the courts of the United States could not take cognisance of any offence that was not a violation of some law of the United States, whether common law or statute, and it was of such violations of the laws of the United States that exclusive cognisance was given to the Circuit Courts, unless otherwise provided by law. If so otherwise provided, the jurisdiction of the Circuit Courts, thus declared to be exclusive, might be exercised equally by the courts of the states. It was long a subject of controversy and doubt whether Congress might not thus confer jurisdiction upon the courts of the

states to enforce the laws of the United States: see *Jackson v. Rose*, 2 Va. Cases 34; 1 Kent Com. 401-405. But what has this to do with the jurisdiction of the state courts to punish offences against state laws, even though the offences consist in acts declared by Congress to be offences against the United States? The object of this Act of Congress had no reference to offences against the laws of the states, which were the concern of the states and not of the United States, and could not be made cognisable by the courts of the United States. It was no part of the object of that act to regulate the jurisdiction of state courts under state laws, which belonged to the state legislature and not to Congress, and the act makes no reference to state courts, except to say when they may, and when they may not, exercise the same jurisdiction that is vested in the courts of the United States.

It is obvious that the learned judge construed the terms "crimes and offences," in the 11th section of the Judiciary Act, as signifying the acts by the doing of which crimes and offences are committed. In this way he reaches the conclusion that the Act of Congress vests in the courts of the United States exclusive cognisance of those acts, and I apprehend it could be reached in no other way. But this is not the proper sense of these words. A crime or offence is the transgression of a law, and the same act may constitute several offences. We have seen that the same act may be an offence against the United States, and at the same time, an offence against the state. So the same act may constitute several offences against the laws of the state, of which numerous illustrations are collected in 2 Leading Criminal Cases 555. The terms "crimes and offences," therefore, do not properly signify the acts by which the laws are violated, but they signify the violations of law which those acts produce. And I see no reason for supposing that they were not used in this sense in the Judiciary Act. Congress could give, and intended to give, to the courts of the United States cognisance of criminal acts only so far as they constitute violations of the laws of the United States. So far as they violate the laws of the states, it was not in the power of Congress to confer the cognisance of them upon the Federal courts.

The learned judge did not fail to see that an act done by a party may violate an Act of Congress and so be an offence against the United States, and, at the same time, violate a law

of the state and so be an offence against the state. But he did not clearly distinguish between the act and the offence. Hence he says, in a subsequent part of the opinion, that where Congress allows the state courts to punish, under state laws, the same acts that are made offences against the United States, the sentence of conviction or acquittal in either court (state or Federal) may be pleaded in bar of a prosecution before the other. And so he thinks that when Congress has vested in the courts of the United States exclusive cognisance of crimes and offences against the United States, the courts of the states cannot exercise jurisdiction over the same acts, under state laws, as an offence against the state, without coming into conflict with the Act of Congress. But we have seen that there is no incompatibility or conflict between such an exercise of jurisdiction by state courts, under state laws, and by the courts of the United States, under Acts of Congress.

I think these observations are sufficient to show that the views of Mr. Justice WASHINGTON are not well founded, and that the Act of 1789 does not exclude the state courts from taking jurisdiction of an offence against the state, under a state law, committed by the same act which constitutes an offence against the United States under an Act of Congress. It follows that such a saving proviso as we have been considering is not necessary to enable the courts of the states to exercise their jurisdiction in the cases alluded to.

This conclusion is fully sustained by the cases of *Fox v. State of Ohio*, *Moore v. People of Illinois*, *United States v. Amy*, and *Hendrick's Case*, before cited. In the first and last of these cases the Acts of Congress contained provisos to save the jurisdiction of state courts under state laws. But the existence of the provisos was not noticed, and the cases were decided on the ground of a separate and independent authority in the states to punish offences against their own laws. In the other two cases the Acts of Congress contained no such savings, and yet the state courts were held to have jurisdiction under state laws. See also *State v. Tutt*, 2 Bailey's S. C. Rep. 44.

I see no reason to believe that Congress really intended by the Act of 1864 to exclude the jurisdiction of state courts, under state laws, to punish the circulation of forged notes of national banks. The act exhibits no jealousy or distrust of the state courts

On the contrary, that act amended the Act of 1863, so as to give to the state courts concurrent jurisdiction with the Federal courts, of the important suits and proceedings which may, under that act, be instituted against national banks, the jurisdiction of which was, by the Act of 1863, confined to the Federal courts. And I presume that no good reason can be suggested why a state court should be allowed to punish, under a law of the state, a cheat effected by means of a counterfeit coin, and not be allowed to punish, under a law of the state, a cheat effected by means of a forged national bank note.

Upon the whole, I think that the objection of a want of jurisdiction in the court was properly overruled. I think also that there is no foundation for the other errors assigned in the petition, and that the judgment should be affirmed.

MONCURE, President, concurred.

RIVES, J., dissented.

Judgment affirmed.

Supreme Court of Pennsylvania.

THE PITTSBURGH & CONNELLSVILLE RAILROAD COMPANY v.
WILLIAM A. M'CLURG.

It is negligence for a passenger on a railroad train to put his arm out of the car window, and if the facts are undisputed that the injury resulted from this cause, the Court should pronounce it negligence as a matter of law.

There may be qualifying circumstances in the condition of the passenger which would make special care the duty of the carrier, but such facts should be proved as part of the case. Per THOMPSON, C. J.

The case of the *New Jersey Railroad Co. v. Kennard*, 9 Harris 203, so far as it decided that it is the duty of railroad companies to place guards on their car windows so as to prevent passengers from putting their limbs out, overruled.

ERROR to District Court of *Allegheny county*.

Shiras, for plaintiff in error.

Lowrie & Marshall, for defendant.

The opinion of the court was delivered at Philadelphia, January 7th 1868, by

THOMPSON, C. J.—The plaintiff below, as we learn from the very brief history of the case by the plaintiff in error, no portion of the testimony being given, was injured while a passenger in the cars of defendant, by reason of the protrusion of his elbow beyond the sill of the car window, next to which he sat during the journey, or part of it, and thus coming in contact with a car standing on a switch on the defendants' road. The plaintiff had a verdict on the ground of negligence on part of the company, as we are informed, in carrying the plaintiff, by reason of which he was hurt, but in what the negligence consisted it is not easy to say, as neither the *narr.* nor its substance is given. Was it for negligence in constructing the switch? Or was it because the defendant had not barricaded its car windows? We do not know; but still, perhaps, we may be able to discuss the only point of importance presented, without knowing this.

Assuming the fact, or claiming that negligence on part of the company in performing their duty towards the plaintiff in carrying him had been proved, his counsel prayed the court below to charge as follows:—

“A passenger on a railway car who has unconsciously suffered his elbow to slip beyond the window sill is not necessarily guilty of negligence: *N. J. Railroad Co. v. Kennard*, 9 Harris 203.”

This the learned judge unqualifiedly affirmed, doubtless on the authority of the case referred to in the point. He did right in following the precedent cited, even if wrong; he was bound to do so. If, therefore, there was error in the instruction it was not his fault.

That unconsciousness, arising from insensibility, the result of disease or injury, might qualify what would otherwise be negligence, may be conceded, but that would arise from the difference in the degree of care required on the part of the carrier. If a passenger were known to be afflicted with epileptic fits, or was entirely insane, it would be reasonable to require of the carrier more care and attention than in the case of ordinary passengers; but then the carrier must know the condition of the passenger, and that extra care and control were necessary, and his duty. This, however, we need not discuss, for nothing like this existed in this case. We must regard the remark, “unconsciously suffering his elbow to slip out beyond the window sill,” to mean inattentively. In that sense it was negligently suffered to slip. Of

course, this was negligence *in se*, unless he was under no obligation to take care of himself. But no case asserts that, and every case the contrary. Out of the omission to do so springs the doctrine of contributory negligence which defeats a plaintiff, and which is so firmly established as a principle of law that nobody dreams of doubting it. We have the case then broadly, I think, that negligence is not to be inferred when injury accrues from an exposure of an elbow or an arm out of a car window, while the train is moving, if it be not wilfully done.

This cannot be maintained on any reasonable principle, we think. When a passenger on a railroad purchases his ticket it entitles him to a seat in the cars. In the seat, no part of his body is exposed to obstacles outside of the car. He is secure there, ordinarily, from any contact with them. Where he is thus provided with a seat, safe and secure in the absence of accident to the train, and the carrier has a safe and convenient car, well conducted and skilfully managed, his duty is performed towards the passenger. The duty of the latter on entering arises, namely, that he will conform to all the reasonable rules and regulations of the company for occupying, using, and leaving the cars; and, after doing so, if injury befall him by the negligence of the carriers, they must answer; if he do not so conform, but is guilty of negligence therein, and if injured, although there may be negligence on part of the carriers, their servants and agents, he cannot recover: *Sullivan v. Reading Railroad Co.*, 6 Casey 234; *Penna. Railroad Co. v. Zebe and Wife*, 9 Id. 318, and other authorities. In the latter case we said what is quite apposite in this: "We hold on these principles that the company's liability could not be fixed for the injury consequent on a choice of the passenger in disregard of the provisions made by it for his safety. It was, we think, error in the court to submit the question of the right of the parties to leave the cars at either side, to the jury, in the absence of proof or justifying necessity for so doing. It was not negligence on part of the company that they did not by force of barriers prevent the parties from leaving at the wrong side. People are not to be treated as cattle; they are to be presumed to act reasonably in all given contingencies, and the company had no reason to expect anything else in this case."

Here the duty of care on the part of the passenger is asserted; and it was a case in which two passengers, the plaintiff and son,

instead of leaving the cars by the platform at the station, left on the opposite side, and the son was killed by a passing train on the other track. We held that this was negligence *in se* on part of the passengers, and in the absence of circumstances justifying the exit on that side of the car, the court erred in not charging that it was negligence in law. The authority of this case has not been shaken in this particular. We have repeatedly held that it is the duty of courts in cases of clear negligence arising from an obvious disregard of duty and safety, to determine it as a question of law: *Catawissa Railroad Co. v. Armstrong*, 2 P. F. Smith 282; *Penna. Railroad Co. v. Ogier*, 11 Casey 71; *Penna. Railroad Co. v. Zebe*, 9 Id. 318. Numerous other authorities might be cited for this. Where the inference from the facts is necessarily that there is negligence, the court ought to determine the negligence as a matter of law. Of course the assertion of the principle in this way presupposes no answer to the facts, so as to rebut the inference to be drawn, and implies that this may be done in all cases, if there be facts to that effect.

A passenger, on entering a railroad car, is to be presumed to know the use of a seat, and the use of a window; that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy—but not to occupy. Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority, and if he allows it to protrude out of it and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there; nor misled in regard to the fact that it is not part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken, in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court. This is undoubtedly the rule in Massachusetts: *Todd v. The Old Colony Railroad Co.*, 3 Allen 18;

and again in same case, 7 Allen 207. In that case the point was distinctly presented whether it was negligence to ride with an arm or an elbow out of a car window, and it was declared that it should have been so ruled by the court instead of being referred to the jury; and the court below was reversed for not so ruling. See opinion of C. J. BIGELOW in the last case. So in substance is *Holbrook v. The Utica & Sch. Railroad Co.*, 12 N. Y. 236. It is true, the judge below having given a very decided opinion on the fact of negligence, sitting with an elbow on the window, and that it was negligence, the Court of Errors and Appeals refused to interfere; but RUGGLES, J., indicated his opinion to be in favor of the doctrine. We held in the *North Penna. Railroad Co. v. Heilman*, 13 Wright 60, that a failure of a traveller when crossing a railroad track, to look out for passing trains, is negligence in law, and so to be pronounced. This was fully in accord with what we had repeatedly held, that what "in a given state of facts constitutes negligence, is generally a question of law," per WOODWARD, C. J., in *Catawissa Railroad Co. v. Armstrong*, 2 P. F. Smith 286; and in *Penna. Railroad Co.¹ v. Ogier*, 11 Casey 71, we said there may undoubtedly be cases in which the only facts proved may present so clearly and incontestably features of negligence in regard to the specific ground of complaint, that it may become the duty of the courts to pronounce it such as matter of law." There are many cases in other states in support of this rule.

In the absence of some justifying necessity, or incapacity to take care of himself on part of the passenger, no one can doubt, I think, from the reason of the thing, in view of the nature of the vehicle used, being a railroad car, that to extend an arm or a hand beyond the window sill is dangerous, and is recklessness or negligence. Wherever the facts present such a case singly, and without any controlling or justifying necessity, we think the court ought to declare the act negligence; and as there was nothing like this shown in the case before us, we think the court ought not to have affirmed plaintiff's point. Unconsciously exposing himself did not help the plaintiff's case, as it was not shown that this unconsciousness was not the result of a want of prudent attention to his situation on part of the plaintiff. It would be a novel answer to the allegation of negligence, to allege that the plaintiff slept in such a position as he was in when hurt, and that

would be a condition of unconsciousness. Sleeping where due care would require one to be awake, or in dangerous circumstances, is negligence, and no answer to the company can be given to the act. Of course these views are predicated of a case in which there are no facts to qualify or justify the act. It is possible that a state of facts might be found to show an exception to the rule, and where that occurs the rule ceases. But none such appears as this case is presented.

It must be admitted that the case of *New Jersey Railroad Co. v. Kinnard*, 9 Harris 203, announces a different rule. There the plaintiff's elbow came in contact with a post or upright of a bridge. The case was not put upon the ground that there was negligence on the part of the company in constructing the bridge, but upon the ground that the company were negligent in not placing barriers around the window to prevent passengers from exposing their limbs outside. The learned judge (GIBSON, J.) instructed the jury that a car which was not so provided was not, to use his peculiar expression, "roadworthy." Predicated of this idea, he held that passengers had a right to ride as they pleased, and to sit with their elbows on the window sills, and beyond it, if they chose. In fact, he seems to have required no duty of care on part of the passenger in this particular; for, had he, it seems to me he would, even on his own theory of the duty of the company in barricading their windows, have come to the conclusion if the want of it was negligence, it was also negligence on part of the passenger not to take greater care on account of the want of the precaution, and that would have been contributory negligence, which would have prevented the plaintiff from recovering.

The case was affirmed in a *per curiam* opinion, for the reasons given by the learned judge below, but with a reservation of approval of that which was really the ground on which the case was put. "The language of the learned judge who presided at the trial, seems to be too broad as a general principle, where he says that no car is good if the windows are not so constructed as to prevent the passengers from putting their limbs through them. But in its application to a road, which, in places, is so narrow as to endanger projecting limbs, the instruction is proper." It is not unjust to this *per curiam* to say that it repudiated the main ground on which the case was put in the court below, and affirmed

it on a principle not in the case at all, namely, the narrowness of the passage-way under the bridge. The bridge was not built by the railroad company; as it was over a canal, it was probably built by the canal company. The passage-way was wide enough for the cars to pass conveniently, but that is nothing to the purpose; the narrowness of the passage-way was not the ground of the recovery. The report of the case says the "whole question was whether the defendants were obliged to construct their cars with slats, bars, wire gauze, or other barricades, so that a passenger could not put his arms out of the windows. If the defendants did not do so, whether they are liable." It is evident the case was very little considered, and, in the presence of authorities cited, ought not now to be regarded as the law. It is very remarkable that it should have been said in the opinion that the doctrine of barricades about the car-windows was too broad, as a general principle, but just in its application where the passage-way was so narrow as to endanger projecting limbs. This was a limitation of the principle impracticable in practice. The windows would necessarily be the same on the entire road, if made to suit any peculiar portion of it. In this again is shown that it was not a case which had been considered much.

In conclusion, we have simply to reassert that where a traveler puts his elbow or an arm out of a car-window, voluntarily, without any qualifying circumstances impelling him to it, it must be regarded as negligence *in se*; and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law.

We think the court erred in answering the plaintiff's point in the affirmative, and the defendant's in the negative, and for these reasons the judgment must be reversed.

Judgment reversed, and *venire de novo* awarded.

District Court of the United States. Southern District of New York.

IN THE MATTER OF JAMES D. RAY, A BANKRUPT.

A creditor who has proved his debt has a right to examine a bankrupt under section 26 of the act, although his debt may appear to be barred by the Statute of Limitations of the state in which the proceedings are instituted.

A debt barred by the Statute of Limitations is not "due and payable" so as to be

provable in bankruptcy, but as there is no limitation in the Bankruptcy Act whose operation is coextensive with the limits of the United States, no claim can be held barred unless it be shown that it is not recoverable in any part of the United States.

UPON the day appointed by the register on the application of Wheeler, Madden & Clemesen, creditors, for the examination of the bankrupt and his wife, and other witnesses, under section 26 of the Bankruptcy Act, the bankrupt objected to the examination on the ground that the claim of these creditors was barred by the Statute of Limitations of the state of New York, and in support of such objection, the bankrupt put in before the register an affidavit and plea for the purpose of availing himself of the plea and defence of such statute. The facts were conceded by the creditors to be correctly set forth in the affidavit. The affidavit made by the bankrupt stated that the claim of the creditors was filed with the assignee December 7th 1867, the assignee having been appointed September 12th 1867; that such claim was founded upon a note made by the bankrupt and another person, as copartners, dated at New York, May 1st 1860, for \$747.14, payable in eight months after date, and upon a balance of account against said copartnership, amounting to \$1197.38, for merchandise purchased by it from said creditors prior to October 1860; that the debtors and the creditors all of them resided within the state of New York at the time such indebtedness arose or was contracted, and have thence continued and now are residents within said state; that the credit on said indebtedness expired, and the entire claim became due and payable, and so remained for more than six years before the filing of the original petition of the bankrupt herein; that any right or cause of action accruing thereon against said copartnership or said bankrupt, did not accrue within six years next before the filing of said petition; that by reason thereof the said claim is barred by the Statute of Limitations of the state of New York; that the said note was made and delivered at New York, and was payable there, and the said merchandise was purchased there, and the claim of said creditors was contracted there; the bankrupt takes objection to all proceedings by said creditors, or on their behalf, in this matter, and makes the affidavit, and interposes the plea of said statute, for the purpose of availing himself of said objection, and of said statute, as a defence and bar to said claim, or to its allowance as a claim against his estate, and as a bar to the right of

said creditors to have such examination ; and that the bankrupt has in no way or manner waived such objection.

On the foregoing facts, and on the request of the parties, the register certified to the District Judge for his opinion thereon the following question : " Has a creditor who has proved his debt, but whose debt is barred by the Statute of Limitations of the state of New York, as set forth in said affidavit and plea, a right to examine the bankrupt under section 26 of the Bankruptcy Act ? "

BLATCHFORD, J.—At the request of the parties, made through the register, the court consented to receive written briefs on the question. A brief has been furnished on the part of the bankrupt, but none on the part of the creditors. The questions discussed on the part of the bankrupt are, whether the bankrupt is stopped of availing himself of the Statute of Limitations by reason of his having set forth the claim of the creditors in the schedule of creditors annexed to his petition ; whether the bar created by the statute of New York cannot operate as a complete bar to the debt, unless it be also shown that the debt would be barred in all the states of the Union ; and whether this being a proceeding for the relief of the debtor, and the discharge he petitions for being a matter of concession and favor, he cannot interpose a technical defence or objection, or one that does not go to the equities between the parties. It is argued on the part of the bankrupt that the placing by him of the debt upon his schedule to the petition, is not a promise to pay the debt, or an admission of a willingness to pay it, or an admission that it is due, or an acknowledgment or recognition of its existence, or of an existing liability to pay it, from which a new promise may be inferred ; the fact that the debt is named, is a proceeding, the sole purpose of which is to obtain a discharge from all liability in the debt, being a circumstance calculated to repel the presumption of an intent or promise to pay the debt ; that under the facts in regard to this debt, the creditors cannot claim the benefit of the Statute of Limitations of any other state than New York ; and that the right to a discharge, in complying with the law, is a legal right.

The question certified is treated by the argument on the part of the bankrupt as identical, whether the claim in this case is provable under the Bankruptcy Act or not.

The 26th section provides that the court may, on the application of "any creditor," require the bankrupt to submit to an examination upon, among other things, all debts claimed from him, and all matters concerning his property and estate. The 22d section provides that the court may, on the application of "any creditor," examine upon oath the bankrupt or any person tendering, or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake. Before a creditor can, under section 26, apply for an order to examine the bankrupt, he must prove his claim. The words "any creditor," in that section, mean, any creditor who has proved his claim. It is true that the examination under that section may extend to an examination concerning the claim itself. But an examination of the bankrupt, when desired, in regard to a claim proved or sought to be proved, can take place under the 22d section; and the words "any creditor," in the last clause of that section, must, from the language of the whole section, be held to mean not only a creditor who has proved his debt, but a creditor who has tendered proof of his debt which has not yet been allowed, so as to authorize the latter as well as the former to apply for an examination under the 22d section. The order for the examination in the present case is stated to have been made under the 26th section, and must intend that it was not to be merely an examination in reference to the debt claimed by those creditors. As their debt had been proved, they had a right under section 26 to apply for the order. The debt being proved and the order being made, the creditors have a right to proceed with the examination.

The 23d section requires the court to allow all debts duly proved. But under the provision in the 22d section, before quoted, the court is required to reject all claims not duly proved or where the proof shows the claim to be founded in fraud, illegality, or mistake. The claim of these creditors must stand as proved until it is rejected either as not having been duly proved, or as having been founded in illegality or mistake. If the bankrupt desires to have the claim rejected for any such reasons, he must apply to the court by petition, and a reference will be

ordered, under section 38, to take the examination provided for by section 22.

I might content myself with answering the question certified, by saying that a creditor who has proved his debt has a right to examine the bankrupt under section 26 of the act, although his debt may appear to be barred under the circumstances set forth in this case. But what is really desired by the parties is a decision whether the debt in this case is one which ought to be rejected as being barred by the Statute of Limitations of New York. The Bankruptcy Act is silent as to the operation of any statute of limitation. The 19th section provides that "all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, may be proved against his estate." This language is broad enough on its face to include all debts, no matter of how long standing. I have not met with any decision under any former Bankruptcy Act of the United States, on the question presented; but in England it has always been held, under the Bankruptcy Law, that a debt which cannot be recovered in an action against a plea of the Statute of Limitations, cannot be proved in bankruptcy: *Ex parte Dardney*, 15 Vesey 479; *Re Clendening*, 9 Irish Eq. R. N. S. 287. And in England a dividend paid on such a debt was ordered to be repaid: *Ex parte Dardney, ubi supra*. The principle involved is that the debtor is under no obligation to pay such a debt; and that, therefore, it cannot be said to be "due and payable." The rule in England continues to be the same, and the ground on which it is put by elementary writers is, that the bankrupt has no option as to defending or not defending a claim against his estate in bankruptcy, save through the action of the assignee, and the assignee is bound, in the interest of the body of creditors, to set up any legal defence which the bankrupt could have set up if he were not bankrupt: 1 Archbold's Law of Bankruptcy, by Griffith & Holmes, ed. of 1867, 533; 2 Doria & Macrae's Laws and Practice of Bankruptcy 787.

I think that is the proper rule; and that, under section 19 of the Bankruptcy Act, no debt can be considered "due and payable" which is barred by limitation, and that a debt so barred cannot be proved in bankruptcy.

Is the debt in the present case so barred?

The Code of Procedure of New York provides (sections 74,

91) that a civil action or causes of action such as those in this case can only be commenced within six years after the causes of action occurred; but that the objection that the action was not commenced within the time limited can only be taken by answer. The whole scope of the statute is one affecting the remedy merely, and not the contract. A complaint setting out a cause of action which appears to have occurred more than six years before the action was commenced, is not objectionable on the face, or open to a demurrer. The defence of the limitation must be set up by answer. If it is not so set up, it is waived. Now, the distinction between a law which affects the right and merits of a contract, and extinguishes it and makes it null and void, as the result of a proscription or limitation, and a law which does no more than limit the time within which an action must be brought upon the contract in the courts of the country which enacts the law, is well settled. A law of the latter description is wholly confined to the country enacting it. A law of the former description may, under certain circumstances, so affect the contract and its construction as to be capable of being invoked as a bar to an action on it in another country: *Huber v. Steiner*, 2 Bingham's N. C. 202; Story's Conf. of Laws, § 182. The Statute of Limitations of New York goes exclusively to the remedy in the courts of New York, and could never be invoked as a bar to an action in another state on the contract in question in this case. This principle is sought by the creditors in this case to be applied to their claim; and they insist that, as they would have a right, notwithstanding anything found in the law of New York, to sue the bankrupt on their claim, if they find him within the jurisdiction of another state, they ought not to be deprived of the privilege of proving their claim in bankruptcy, under a law of the United States, whose operation is co-extensive with the limits of the United States, unless it is shown that the claim is barred throughout the limits of the United States. The English Bankruptcy Law is co-extensive as to territorial operation with the English Statute of Limitations.

The Bankruptcy Act of the United States operates in all the states as well as in New York. Under these circumstances I think that a debt to be barred by limitation, so as not to be provable under the Bankruptcy Act, as not being "due and payable," must be shown to be so barred throughout the limits of the United

States. I am the less reluctant to hold this view because a contrary rule would have an effect which the counsel for the bankrupt in this case seem to have entirely overlooked. By section 32 of the Bankruptcy Act, a discharge under it discharges the bankrupt from all debts and claims which are by the act made provable against his estate, except such as are excepted by section 33; and by section 34 it is declared that the discharges shall, with such exception, release the bankrupt "from all debts, claims, liabilities, and demands which were or ought to have been proved against his estate in bankruptcy."

If it be held in this case that the debt cannot be proved against the estate, it will not be discharged, and it will stand against the bankrupt. If he shall hereafter be sued upon it in another state, the discharge in bankruptcy will be no defence to such suit, if it appears that in a direct adjudication the creditors were refused permission by the Court in Bankruptcy to prove their claim, on the ground that it was barred by the Statute of Limitations of New York, and that statute will be no defence to such suit. The effect of applying in this case the views contended for on the part of the bankrupt would be very disastrous to his interests.

The schedules to his petition disclose the names of 324 creditors, whose aggregate debts, as set forth therein, amount to over \$120,000. Of these creditors, 235 are set down as residing in the state of New York. Of the entire amount of debts, some \$30,000 have been put into the shape of judgments. The rest appear to have been (all of them) past due for more than six years at the time the petition in bankruptcy was filed, and to be simple contract debts.

The same rule that would exclude the debt in question here from being provable, would exclude others, probably the debts of all the 235 creditors who reside in New York—possibly the debts of all the 324, except those in judgments. Thus, the bankrupt would by his discharge secure discharge from but a meagre fraction of his debts. In the present case ten debts have been proved, amounting in the aggregate (including the debt in question here, which is proved at \$2897.29), to a little over \$13,500.

These debts are all of them in the same category. They are simple contract debts, not in judgment, and were all of them due and payable more than six years before the filing of the petition in bankruptcy in this case. If they should be held to be not

provable against the estate of the bankrupt, because they were barred by the Statute of Limitations of the state of New York, at the time such petition was filed, and yet should be held under section 34 of the act to be discharged by a discharge in this case, because they were in fact proved against the estate, and all the other unproved simple contract debts should be held not to be discharged, because they were not proved; and because, having been due and payable for more than six years before the filing of such petition, they were not provable, the results would be that the debts in judgment, amounting to \$80,000, and the debts proved, amounting to \$13,500, would be discharged, while the remainder of the debts, amounting to nearly \$80,000, would be unaffected by the discharge.

This is certainly a result which the bankrupt cannot be supposed to be aiming at by his proceedings in bankruptcy, or by taking the objection that the debt in question here is not provable against his estate. And yet it is a result which must inevitably follow, if the views urged on his behalf are sound. I do not think that any interpretation of the act ought to be admitted, which can work out any such result if any other interpretation is fairly to be deduced from its provisions. It is not to be presumed that a beneficent statute like this, which was designed to restore to the pursuits of trade and business (for the benefit of the whole country), energies which have been crippled by misfortune, is so hampered in its operation as not to extend to the discharging of a simple-contract debt, which has been past due for more than six years. The provision in section 19, that "all debts due and payable from the bankrupt" may be proved, is broad enough to include all debts, no matter how old, for the recovery of which, but for a discharge under the act, the bankrupt can be sued anywhere within the territory where the discharge will operate; and no provision is found in the act which destroys the provability of a debt because it is barred by the Statute of Limitations of one state.

These views dispose of the questions presented in the certificate from the Register, without the necessity of deciding on any of the other points raised. But I ought to say that I am not satisfied that the setting forth of a debt in a schedule to a voluntary petition in bankruptcy can have the effect of destroying a bar which has come into operation in regard to a debt by virtue of the Statute of Limitations.

*District Court of the United States. Northern District of
Illinois. In Bankruptcy.*

IN THE MATTER OF FREDERICK JEWETT, BANKRUPT.

Where there are both individual and partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to the bankruptcy, and being principally the same goods in the purchase of which the partnership debts had originated; the partnership creditors will be entitled to be paid *pari passu* with the individual creditors.

THE facts appear in the following certificate of the Register, Hon. LINCOLN CLARK.—This being the day fixed for the second meeting of creditors, the assignee, Mark Kimbell, Esq., made his report by which it appeared that he had in his hands the sum of thirty-seven thousand six hundred and forty-six dollars and eighty-three cents (\$37,646.83) cash as assets subject to distribution, as the creditors or the assignee should determine according to section 27 of the Act of Bankruptcy.

Upon due consideration and in view of what might be necessary to meet future expenses and provide for claims not yet proved, &c., a majority of the creditors being present and declining to decide, the assignee, at their request, decided that twenty-five per cent. of the cash in his hands should be distributed among those creditors who had proved their claims and who were legally entitled to receive a dividend out of the assets of the bankrupt's estate, and that the surplus should remain in his hands subject to future distribution. The said Jewett was forced into bankruptcy under the involuntary provisions of the act at the instance of The Third National Bank of Chicago.

At the time of the adjudication of bankruptcy the said Jewett was a hardware merchant in the city of Chicago, and previous to February 1st 1867, was in copartnership with one Oliver R. Butler for the space of ten years, under the firm and style of Jewett & Butler. On said 1st of February the said Jewett purchased the entire interest of Butler. The entire indebtedness of the bankrupt was more than one hundred thousand dollars (\$100,000). The whole amount of the assets, good and doubtful, were estimated at between fifty thousand dollars (\$50,000) and

sixty thousand dollars (\$60,000). About eighty-five thousand dollars (\$85,000) of claims were proved by the individual creditors of Jewett, and about sixteen thousand dollars (\$16,000) were proved by the creditors of Jewett & Butler.

The Third National Bank, who instituted the proceeding, were individual and joint creditors.

Upon this state of the proofs Mr. *Clarkson*, attorney for some of the individual creditors, and also for some of the joint creditors, contended that the individual creditors and the joint creditors should be paid *pari passu* out of the assets. Mr. *Waller*, attorney in behalf of some of the individual creditors, contended that the joint creditors could receive no portion of the assets of the bankrupt until the claims of the individual creditors were fully satisfied. There was no evidence of the solvency of Oliver Butler, nor that there were any partnership assets; nor was there any evidence to the contrary, and thereupon the question arose whether the joint creditors were entitled to share equally with the individual creditors in the dividend of assets. The register overruled the objection made by Mr. *Waller*, and decided that all the creditors were entitled to equal distribution, which question, by the agreement of the respective attorneys, is certified to the court for its decision.

In this case the bankrupt is as much bound to pay the debts due and owing by Jewett & Butler as he is to pay his own individual debts.

In fact the debts owing by the partnership are several as well as joint; and the creditors have a right to proceed against any property or interest therein which he has for the satisfaction of their claims; and if there is any principle in equity which qualifies this rule it is not because the obligation of the bankrupt is any less, nor because all his interests in his property are not subject to the payment of his debts; but equity will interfere only to protect the relative rights of others as those rights shall be made to appear. It appears to me, then, that *prima facie* all the creditors of the bankrupt have the right to proceed against his property for the satisfaction of their debts.

It is undoubtedly a rule in equity that where there are individual creditors and partnership creditors, and individual assets and partnership assets, the individual creditors must resort to the individual assets, and the joint creditors to the partnership assets;

and it is not denied that this rule is applicable in bankruptcy. But how stands the rule when there are separate and joint creditors, but no joint or partnership assets, all the assets being those of the bankrupt? There are exceptions upon this subject: Story on Part., § 378, says: "These exceptions allow a joint creditor to share *pari passu* with the separate creditors in every case to which they are applicable. They are of three sorts: (1.) When the joint creditor is the petitioner for a separate commission against the bankrupt partner. (2.) Where there is no joint estate and no living solvent partner. (3.) Where there are no separate debts." The rule then is that "where there is no joint estate and no living solvent partner," the joint creditors shall share equally with the separate creditors.

How then is the exception to be manifested? Under what circumstances shall it be considered that there is no joint estate and no solvent living partner?

If there was any joint estate the bankrupt was interested in it and he was bound to set it out in his schedule, but he has set forth none. No doubt it would have been competent for the individual creditors to have proved that there was a joint estate and a solvent living partner, but they did not seek to do it, but contended that the individual debts should be first paid although there was no joint estate, and although the individual debts would consume the whole amount of the assets.

Can it be that the joint creditors have no rights against the assets until they allege and prove negative propositions?

In equity where two parties have a lien upon one fund, and one of the parties has a lien also upon a second fund, the party having a lien upon the first fund can compel the other party to exhaust his remedy upon the second fund before he can resort to the first.

But must he not allege and prove the existence of the second fund?

I suppose it is clear that he must.

How does the statement of facts and the proof in the foregoing case differ?

There is a view of the subject which would render it exceedingly unjust that the joint creditors should be postponed to the individual creditors.

The testimony of Jewett was taken in his deposition. He

proves, that, after he bought out the interest of his partner, he purchased but few goods; of course the debts of the joint creditors were made in the sale to the firm of Jewett & Butler of the goods which constituted chiefly the assets of Jewett.

Should these goods be turned away from the payment of the joint debts, which constituted the consideration for making them, to the payment of the individual debts?

"Equity alone can restrain the joint creditors from receiving their full dividend until the joint effects are exhausted." See James on Bankruptcy 91.

I am of the opinion, in the present state of the proofs, that the joint creditors should be paid *pari passu* with the individual creditors.

DRUMMOND, J.—As there seems to be no joint fund or source of payment for the joint creditors, I think the decision of the Register is right.

District Court of the United States. Northern District of Illinois. In Bankruptcy.

IN THE MATTER OF FREDERICK JEWETT.

Where A., one of two partners, sells his interest in the concern to his copartner, B., taking his notes therefor, and B. becomes bankrupt, leaving some of the notes unpaid, A. cannot receive a dividend from the assignee until all the partnership debts have been paid.

THE facts are set forth in the following certificate of the Register, Hon. LINCOLN CLARK.—This being the day fixed for the second meeting of creditors at the office of the Register for the purpose of hearing the assignee's report, and for declaring a dividend of assets among those entitled thereto, Oliver R. Butler claimed a dividend as creditor of the bankrupt, upon a proof of claims heretofore filed in the sum of ten thousand two hundred and fifteen dollars and forty-three cents (\$10,215 ⁴³/₁₀₀).

The proofs consist of twelve promissory notes, each for the sum of \$750, made by the said Jewett to the said Butler, dated February 1st 1867, payable the 1st of May 1868, and on the 1st of each and every month thereafter until the whole should be paid.

The said Oliver R. Butler had been copartner with the bankrupt for ten years anterior to the 1st day of February 1867, at which time he sold his entire interest in the firm to the said Frederick Jewett for about the sum of \$25,000, and took from him his promissory notes in payment therefor. It appeared in evidence, by the deposition of the said Jewett, that the notes hereinbefore described were a portion of those given in the purchase of the interest of the said Butler.

Clarkson, attorney for a portion of the creditors, and also for the assignee, objected, that the said Oliver R. Butler was not entitled to a dividend upon those notes. I sustained the objection, and decided that no dividend could be allowed upon the proof of them.

Waller, attorney for Butler, desired the matter to be certified to the court, the question being as to whether the said Butler was entitled to a dividend upon the basis of the said notes.

It appeared that the joint indebtedness of Jewett & Butler was some \$16,000, no portion of which had been paid by Butler. That Jewett, after the purchase of Butler's interest, bought but very few goods, from which the inference is clear, that, had Butler been allowed to receive a dividend, he would have taken the proceeds of assets liable to the payment of his own debts, at the same time that he had not, as partner, paid the partnership debts.

That Butler could not have a dividend until all the partnership debts were paid, seems to me clear. Whether, after that, he would come in to share with the individual creditors, is a question not now calling for consideration.

DRUMMOND, J.—In this case, it appearing that the only fund for payment is the individual property of the bankrupt, I have no doubt that there can be no dividend allowed to Butler so long as there is anything due from him. The decision of the Register is consequently correct.

Supreme Court of Vermont.

WASHINGTON FORD v. AUGUSTUS FLINT ET AL.

A. made a deed by which he granted and conveyed certain lands to his daughter B. "during her lifetime, and to her eldest son, which shall be living at her decease, and to his eldest son at his decease, and so on from eldest son to eldest son to the latest generation," *habendum* to B. "and to her heirs as aforesaid." This deed he never delivered, but after his death it was found in his papers and delivered by his administrator to B., who went into possession under it, and afterwards made a deed in fee for the same premises to C., who held by himself and his grantees in fee for thirty-six years. *Held,*

1. That B. took a life estate only.
2. That her eldest son living at her decease took a fee tail directly from the original grantor.
3. That the only title B. took and conveyed and C. took and held under B. was under color of the deed from A., and therefore both B. and C. and the subsequent purchasers under them were estopped from disputing the validity of A.'s deed, because it was not delivered in the lifetime of the grantor.
4. That C. took with notice of the title of B.'s eldest son, and his possession was not adverse so long as B. lived.
5. That the deed from A. to B. being on record, was notice to all subsequent purchasers of the extent of B.'s title.

Fifield, for plaintiff.

Clark & Rowell, for defendants.

The opinion of the court was delivered by

BARRETT, J.—This is ejectment for a parcel of land, part of the home farm formerly owned by Nathaniel Spear, who died in January 1826. On the 15th day of November 1819, he made and executed deeds of separate parcels of said farm to each of several of his children, but kept said deeds in his own possession until his death. The day after his death, one of his sons, who was subsequently appointed administrator of his estate, delivered said deeds to the respective grantees therein named. One of said deeds, covering and conveying the land sued for in this writ, was to Aseneth Ford, a daughter of said Nathaniel, in and by which he did "give, grant, convey, and confirm unto her, the said Aseneth, during her lifetime, and to her eldest son which shall be living at her decease, and to his eldest son at his decease, and so on from eldest son to eldest son, to the latest generation," &c.: *habendum* "unto said Aseneth and to

her heirs as aforesaid," &c., followed by the usual covenants of warranty.

It appeared that said Aseneth and her husband, in the spring of 1826—the spring next after the January in which her father died—went into possession of said premises under claim of title by virtue of said deed from Nathaniel Spear, and remained in possession until 1829, when she sold and conveyed in fee said premises to Brown by deed of warranty, who then took possession and held till he conveyed in fee by deed of warranty; and after that the premises passed by like deeds of warranty through several successive owners to the present defendants, each of whom took possession at the time of his respective deed, and held till he conveyed as aforesaid, and the defendants are now in possession. The said Aseneth died March 1st 1865, her husband still surviving. The present plaintiff is her eldest son living at the time of her decease. The plaintiff claims title in himself by virtue of said deed of Nathaniel Spear. One ground of defence is, that that deed created an *estate tail*, or a *conditional fee* at common law, unaffected by the statute *de Donis*; and that the entail was barred by the deed of warranty in fee of Aseneth to Brown, and that Brown took an absolute title in fee under that deed. The plaintiff, on the other hand, claims that his mother took only an estate for life, and, on her death, that he took in remainder, and is entitled to hold according to the form of the gift—the title thereafter to go to such persons, and in such manner, as the laws of this state shall warrant.

The *conditional fee* or *estate tail* at common law, before the statute *de Donis*, was created by a conveyance to the donee of an estate that would have been an absolute *fee simple*, were it not limited by the condition, viz., of issue being born, who, according to the form of the gift, were to take by inheritance from the donee of the conditional fee. In conformity with this idea, all the special rules were devised, adopted, and applied, that governed the rights of parties in respect to such estates, as the right of the donee on the birth of the prescribed issue to convey an absolute fee simple, and thus bar the issue of the right to take, as well as the donor of the right to the reversion. Of course the donee could not convey such *absolute fee simple*, unless it had been vested in him by the form and effect of the gift, contingent at first, to be sure, upon the performance of the condition by the

birth of the prescribed issue. "It was a *fee simple* on condition that the donee had issue:" 2 Bl. Com. 110. By the gift, the entire title passed from the donor, subject only to the possibility of reverter. During the life of the donee, the property and estate were vested in the donee beyond all power of the donor to affect the character of the estate. Upon the birth of issue, the absolute and unqualified disposition of it was in the *donee*; and if such donee made a conveyance of the fee, the grantee took such fee as against both the original donor and the heirs to whom the estate was limited: 4 Kent's Com. 11 *et seq.*; 4 Cruise Digest, by Greenl. 68, §§ 5, 6, 7; Co. Lit. 19 a (by Thomas, vol. 1, p. 507 *et seq.*). In *Willion v. Berkley*, Plowd. 233, Ch. J. DYER said, "The fee simple vested at the beginning, though by issue the donee had power to alien, which he had not before, but the issue was not the cause of having the fee, but the first gift." On p. 250, "Further, as to the common law before the statute, if land had been given to a man and to his heirs of his body begotten, this was not taken to be a full and perfect inheritance, until the donee had issue of his body * * * But (as I take it) it was a *fee simple* presently before issue, but the having of issue made it more full than it was before; for after issue he had power to alien, and thereby to bar the issues and the donor," &c., &c. In the margin it is said, herewith agree 1 Finch 100, 2 Id. 121.

In the case before us the deed, in the granting part, does not purport to convey a fee, either simple or conditional, to Aseneth, but only an estate for life. By the terms of the grant, the estate in her would not be conditional at all. It would not depend on any contingency for its character, or as to her rights in respect to it.

It would be the same in her, whether any of the prescribed after-takers should be born during her life, or in existence at her death or not. No fee of any kind having been conveyed to her, there would be no quality of estate existing in her on which the birth or existence of any of the prescribed sons could operate to invest her with any different title, or incidents of title, from that specifically defined in the grant.

If a conditional fee or an estate tail was created at all by the grant of the deed, it was created in the plaintiff, and not in his

mother. It is in this respect like the case of *Owen v. Smyth*, 2 H. Bl. Rep. 594.

This view would seem to be conclusive against the ground of defence now under consideration, unless upon the face of the whole instrument, by construction, the intent was manifested on the part of said Nathaniel to create an *estate tail* or *conditional fee* in said Aseneth, and the instrument itself has the legal requisites for such a purpose. The granting part of the deed expressly gives the land to her during her lifetime, and to *her eldest son living at her decease* and to the successive eldest sons as named. These are mere words of *purchase*, and not of *inheritance*. It is conceded that, in order to constitute an estate tail, the land must pass from the original donee by *inheritance* to the next one entitled,—that is, he must take as *heir* from her, and not as grantee from the party creating the estate,—that she must take and hold the whole estate under the deed, with no limitation on its quality, except as it is affected by the restriction to the specific line of direct heirship.

While it is further conceded that the words of the granting part of the deed would not create such an estate, for want of words of inheritance, it is claimed that resort may properly be had to the *habendum*, upon familiar rules governing the construction of such instruments, and that the word “heirs” therein supplies what is lacking in the granting part of the deed, and shows that the designation of the *eldest sons* in succession is to be construed as equivalent to the expression “the eldest male heirs of her body in succession.” We assent to the propriety of the rules invoked, but fail to find them efficacious for the desired purpose. The meaning of the word “heirs” is not confined to its technical import of a *taker by inheritance*. If not affected by other language in the instrument, that sense, and a corresponding legal effect, would be given to it. But when used in connection with other language describing and designating the same subject, the whole is to be taken into consideration, and a meaning is to be assigned to the word according to what shall appear to be its intended sense, within the scope which both law and use have rendered it susceptible of. Now, in the *habendum*, “to her the said Aseneth Ford, and to her heirs as aforesaid,” &c., is the expression. There is a slight peculiarity in this that is consistent with, if it does not indicate, the purpose of excluding the idea that the

sons were to take as *heirs* of the mother. The usual form in common deeds conveying an estate of inheritance would be, "to her the said Aseneth, her heirs and assigns," &c., leaving out the words used in this deed, "and to" (her heirs, &c.), which, as used in this case and context, may seem to indicate separable and disconnected interests and rights to be had and held by her, and by her heirs. But "to her and to her heirs *as aforesaid*," shows that the grantor did not intend to change, by enlargement or otherwise, just what was imported by the language in the granting part of the deed, and that "*heirs*" was used as *descriptio personarum*,—as a comprehensive single word, to mean the same thing as, and as a substitute for the specific designation in the granting part, of the persons to take after the said Aseneth. See remarks of Lord THURLOW in *Jones v. Morgan*, 1 Bro. Ch. Rep. 219.

It does not import that she or they are to take in any different character, or any different quality of estate, from the character assigned and the estate created in the grant. She is to hold *as aforesaid*; her heirs are to hold *as aforesaid*—she to hold during her lifetime; her eldest son living at her decease to hold next under said grant, and his eldest son, and his eldest son, and so on, to hold in succession.

Under this construction the plaintiff would not take by inheritance from his mother, but in *remainder* after her special estate had terminated. The case, therefore, does not call for a consideration of much of the learning adduced in the argument on the subject of *estates tail* under the common law, as affected by the statute *de Donis*, and the system, which, in process of time, came into existence, of barring entails by fine or common recovery, and as affected by the statutes, constitutions, and adjudications in this and other states of the Union.

II. In view of such construction of the deed, for the purpose of defeating title in the plaintiff under it, it is claimed that the defendants are entitled to impeach its validity, for the reason that it was never delivered by the grantor.

As already stated, Nathaniel Spear kept this and the other deeds to said several children up to the time of his death, and the day after his death his son and subsequent administrator found said deeds among his father's papers, and he then delivered them to the respective grantees named therein, in the presence of the

widow and some of the heirs, none of whom objected, and none of the heirs nor the administrator have ever questioned the validity of said deed to Aseneth.

The case shows that directly, and in due course of law, the estate of said Nathaniel was settled, and distribution made of it between his several children, and therein the whole of his real estate of which he died seised was appraised; the parcels conveyed by said deeds were appraised and were reckoned as advancement to each of the grantees respectively, and said grantees were made equal to the other children by apportioning his other real estate between all his children in parcels to make the value to each equal. In doing this, $3\frac{1}{2}$ acres were set off to Aseneth, valued at \$27.33. A like quantity and value was set off to Jacob Spear. These parcels, with said advancements, made to them \$657.33 each. To each of the other children other parcels of land of the value of \$657.33 were set off. Each took and held the respective parcels under said deeds and the apportionment thus made by the Probate Court. Now, it will be noticed that Aseneth and Jacob, to whom said deeds of Nathaniel had been delivered, did not take the land described in said deeds under and by virtue of said apportionment, but under and by virtue of the deeds themselves, which were treated by all the parties interested in the estate of said Nathaniel as having already taken effect to invest said Aseneth and Jacob with the title to said respective parcels described therein. *Advancement* implies property already vested in and owned by the party advanced. Said $3\frac{1}{2}$ acres apportioned to each of them, and the larger parcels apportioned to the other brothers who had not been advanced, were held by each respectively by virtue of and under said apportionment. Thus their respective rights accrued, and, as between themselves, have always been asserted, recognised, and acted on.

It is clear, then, that it would not be allowable for Aseneth herself to deny the valid delivery of said deed to her. She treated it, and all interested treated it as giving her a valid title from the time of its coming into her hands. She took possession under it, and held such possession for nearly a year before said apportionment by the Probate Court was made; she having taken possession in the spring of 1826, and said apportionment not having been made till the 15th of March 1827. Her title, then,

to the land in question clearly accrued to her under and by virtue of that deed, and she held and occupied under it till 1829, when she conveyed by deed of warranty in fee to Brown, who entered and occupied thereunder till he conveyed by like deed; and the land has passed by like deeds successively to the defendants. Neither she, nor Brown, nor any one in the chain of title, nor the defendants, have ever claimed by virtue of any other paper title; nor by any other title only such as may have been acquired by possession under *color* given by said deeds; and the defendants now claim, as one ground of defence, by a title acquired by adverse possession under *color of title* given by said deed of Aseneth to Brown.

Now, it is clear that that deed of Aseneth to Brown conveyed only the title and quality of estate that she had; and the deed by which such title and estate in her were created being on record, executed with all due formality, would be notice to all the world of the estate which she held and could convey, and so would preclude any ground to a subsequent grantee for asserting any fraud upon him in this respect, so far as the import and apparent validity of the deed is concerned, whatever might be his rights upon the covenants of warranty in the deed taken by him. By treating the deed of Nathaniel to Aseneth as valid to secure to her, and to them, all the title and estate that it purported to convey to her, and, through her whole life, from 1826 to 1865, having held and enjoyed the premises under the rights which she thus acquired, as against all persons interested in the estate of said Nathaniel, it would seem not allowable now for the defendants to assert the invalidity of said deed for want of valid delivery, against a party entitled by said deed to the premises as an estate in remainder, upon the termination of the life estate created in Aseneth by said deed.

In thus holding upon the case before us, we are not to be understood as deciding the question very much discussed in the able arguments of counsel, and ruled in many of the cases cited, whether the defendants might not set up a title in said Aseneth superior to and independent of the deed in question. In this case no such title is averred, or attempted to be shown. We therefore leave that question untouched.

A question made as to the validity of the proceedings of the Probate Court in making said apportionment and distribution of

the estate of said Nathaniel between his children, we regard as settled and quieted by lapse of time.

III. The defendants claim that they have a good title as against the plaintiff by adverse possession.

This subject presents itself for consideration in two aspects:—
1st. Have the defendants and those under whom they hold been in *adverse* possession to the plaintiff? 2d. Has the plaintiff been in such a position, in the view of the law, that he could assert title and right of possession in himself?

Under the first aspect, it is to be noticed “that the defendants, for the purpose of showing color of title to said premises, gave in evidence the deed of warranty from said Aseneth to Brown, dated May 5th 1829, and it appeared that Brown went into possession immediately after buying of said Aseneth, and Brown and his grantees have been in possession ever since.”

Again: “The defendants further gave evidence tending to show that Brown went into possession of the demanded premises at the time he took his deed from said Aseneth, claiming to own the fee of said premises, and that he and his grantees have ever since been in possession of said premises, claiming to own them, and purchased them, supposing at the time of the purchase that they were getting a good title in fee.” Again: “There was no evidence that said Brown, or any of his grantees, had ever notified the plaintiff, or any one else, that they claimed the land adversely to the plaintiff, or adversely to their deed, or under their deed, except what is to be implied from taking it and putting it on record.”

These extracts from the bill of exceptions show that Brown and his grantees entered under the deed of Aseneth to Brown, and claimed under that deed throughout. This is manifest by force of the statements themselves, as well as by the legal intentment, from giving the deed in evidence to show *color of title*. The showing of color is a technical form of saying that the party claims to have entered and held under the deed by him presented. In this case the idea is conclusively excluded that Brown, or any of his grantees, ever claimed to anybody to hold in any other right than that created by said deed to Brown, and from him to his successors in the title. To what, then, shall the character of the entry and possession by him and his successors be referred? It seems to us to present a strong case for the application of the

principle stated and applied in *Brooks v. Chaplin*, 3 Vt. R. 281, in which case the plaintiff made title by deeds from Phelps through Smith, which had been on record for many years. In June 1828 the defendant entered and commenced improvements on the premises, which were then wild, and continued in possession till ejected by that suit. In October 1828 the defendant took a quit-claim deed of the premises of the heirs of said Phelps, who had deceased. It was urged for the defendant that, as his possession commenced before he took his quit-claim, or proved to have been in communication with his grantors for the purchase, he had a right, on the failure of that title, to rest upon his antecedent possession, and put the plaintiff on the proof of a perfect title in himself. It was held that the defendant's possession before he took said deed became merged in the supposed title acquired by the purchase. ROYCE, J., said: "The defendant having no right of his own, admitted that of the heirs and took shelter under it. And this admission cannot now be revoked by him for the purpose of acquiring greater privileges at the trial in the character of a mere trespasser, than he is entitled to claim in that of purchaser." So it may be said in this case; the defendants having no right except in virtue of a possession taken and held under Aseneth Ford, by taking possession under her, admitted her right as it existed and was shown by the record, and cannot now be permitted to ignore and repudiate the character of the possession which they thus held, and to now assert, as giving them a title against the plaintiff, a possession without right and as mere trespassers. See Adams on Eject. (ed. 1821) 47 *et seq.* and notes.

The defendants, then, were holding under the deed from Aseneth to Brown, and of course were holding according to the legal effect of that deed. That deed took effect upon, and conveyed the title and estate which the grantor had in the premises conveyed, and that was an estate for her life, created by the deed of her father to her, remainder to the plaintiff and the successors named. Now, the possession under such a title was not *adverse* to the plaintiff, for the reason that it was perfectly consistent with his title and right under the same deed from which said Aseneth and her grantees derived their title and estate. The deed of said Nathaniel Spear to Aseneth, being duly recorded and apparently valid, was notice to all subsequent holders of the real state of

the title and interest both of said Aseneth and the plaintiff; and Brown and his grantees stand charged, so far as the plaintiff is concerned, with knowledge of his title and estate, and cannot now be permitted, by virtue of acts that were entirely consistent with the plaintiff's title, and in no manner indicated any claim adverse to it, to assert that the deeds of Aseneth to Brown and of him to successive grantees, and the possession under said deeds, have been adverse to the plaintiff's title and estate.

It may be further remarked that the plaintiff stands upon the deed of Nathaniel Spear to his mother, Aseneth, recorded January 26th 1826, which then and thenceforward became and was fully operative, both to create and establish his title and estate, and to notify all persons coming into the chain of title, or obtaining any interest in the property, just what his title and estate were. Standing thus, he is entirely unaffected by records of subsequent conveyances to which he was not a party. He is not chargeable with notice and knowledge that the defendants were claiming a title in fee, because his mother had given a warranty deed in fee to Brown, and from Brown the property had been conveyed by like successive deeds to the defendants, and all of said deeds had been duly recorded: *Leach v. Beattie*, 33 Vt. R. 195.

Upon this aspect, then, the case stands thus: The defendants entered under a claim of title derived by the deed of Aseneth Ford to Brown, and possession has ever been held under that claim; that deed conveyed only an estate for the life of said Aseneth; the plaintiff held an estate in remainder in the premises after said life estate; he had no notice nor knowledge of any claim as against his title and estate; none has been made; the possession has been consistent with his title. We think he has not lost his title by *adverse* possession.

Under the second aspect it is sufficient to remark, that if the plaintiff had known that the defendants and their predecessors in the occupancy, were claiming to hold and occupy adversely to his title, he could not be injured by it, for the reason that he could not assert his title as against their possession and claim during the life of his mother, which terminated in 1865. If she had not conveyed, she could have held during her life. Having conveyed her title and interest, her grantees could enjoy the same with all the rights and immunities that appertained to her.

The claim of the defendants to be allowed for improvements made during their possession, by way of offset or recoupment to the *mesne* profits to which the plaintiff is entitled, was properly disposed of by the County Court.

The judgment for the plaintiff is affirmed.

The District Court of the United States for the Western District of Michigan.

THE UNITED STATES v. JAMES H. FAIRCHILDS.¹

The 12th and 13th sections of the Act of Congress, approved July 4th 1864, limiting the compensation of agents and other persons for making and causing to be executed the necessary papers to establish a claim for pension, bounty, or other allowance before the pension office, to ten dollars, and declaring it to be a high misdemeanor for any such person to demand or receive any greater compensation than ten dollars for his services under the Pension Act, &c., &c., is not unconstitutional. Congress had power to pass an act with such provisions, under those clauses of the Constitution which declare that "Congress shall have power to raise and support armies," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States," provided, in the judgment of Congress, such provisions were thus necessary and proper at the time they were adopted.

FAIRCHILDS was indicted at the May Term, under sections 12 and 13 of the Act of Congress approved July 4th 1864, 13 Stat. at Large, p. 389.

The 12th section limits the compensation to be received by an agent or other person, for making out and causing to be executed the necessary papers to establish a claim for pension, bounty, or other allowance before the pension office, to \$10.

Section 13 declares it to be a high misdemeanor for such agent or other person to demand or receive any greater compensation for his services under the Pension Act referred to than is prescribed in section 12, and a like offence to contract or agree to prosecute any claim for a pension, bounty, or other allowance under the act, on the condition that he receives a percentage upon any portion of the amount of such claim, or to wrongfully

¹ We are indebted for a copy of the opinion in this case to Hon. S. L. WITHER.
—EDS. AM. LAW REG.

withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant; upon conviction such person to be fined not exceeding \$300, or imprisoned not exceeding two years, or both, according to the circumstances and aggravation of the offence.

The indictment charges that Fairchilds wrongfully withheld \$64.52 from Penrose, a pensioner, part of \$174.52 collected and received by Fairchilds as pension-money allowed and due Penrose from the United States.

Penrose is a discharged soldier, and as such was entitled to a pension. He employed Fairchilds to obtain such pension, which Fairchilds did, and received from the pension office \$174.52.

Of this he paid Penrose \$110, retaining and withholding the balance as compensation for services.

Fairchilds demurred to the indictment on the ground that no offence was charged.

Opinion of the court by

WITHEY, J.—It is argued that Congress has no power, under the Constitution, to define as an offence that which is charged against Fairchilds. The question is, therefore, one of the constitutional power of Congress. Sections 12 and 13 are claimed to be unconstitutional.

It is argued by the learned counsel for Fairchilds that Fairchilds was the agent of Penrose and not of the government, and the district attorney does not deny the proposition. From this it is claimed that the transaction was purely between private citizens of a state, affected them only, and in no wise the United States government, nor any officer or agent of the United States; that these citizens were at liberty to make such bargain as they pleased in reference to the amount of compensation for services rendered by one for the other, whether that service related to pension-money or otherwise; and that no law passed by Congress can, in any regard, control or affect the parties or their rights or dealings under such contract. That when once the pension office paid the money over to Fairchilds, as the agent of Penrose, it was the property of Penrose, and he alone can call his agent to account for the same; and if any restriction can be placed upon the question of compensation of the agent, or any penalty be imposed on the agent for retaining or wrongfully withholding the whole, or

any portion of such moneys, only state laws can impose such restrictions and penalty. That there can be no offence by a citizen which both sovereignties can punish; if the one has the power, the other has not. That the state may exercise the power, and, therefore, the national government cannot.

It must be conceded that the line between state and national jurisdiction is not always clearly defined, and great care is demanded of the courts in passing upon a question like that involved in this case.

The Congress of the United States has, by the passage of the act in question, declared that the power exists under the Constitution of the United States, to protect the fund for the claimant, and limit the compensation which an agent or attorney shall receive for services rendered to one entitled to a pension in procuring the same. To warrant the courts in setting aside this law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist: *Fletcher v. Peck*, 6 Cranch 128. And especially is this so when the question is to be decided by a court of limited or inferior jurisdiction.

The constitutionality of the Act of Congress is, however, made a question, and there is no reason why this court should not consider and pass upon it.

In construing the extent of the powers conferred by the Constitution upon Congress, we are to look at the language of the instrument which confers those powers in connection with the purposes for which they were conferred.

What, then, are the constitutional provisions under which it is claimed Congress could pass the act defining the offence charged in this case? The words of the Constitution are: "Congress shall have power to raise and support armies," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States:" Art. 1, sec. 8.

The Supreme Court of the United States in *McCulloch v. State of Maryland*, 4 Wheat. R. 316, hold that "although among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies;"

and that "a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution." That the Constitution of the United States "does not profess to enumerate the means by which the powers it confers may be executed;" that "the government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

By the aid of the profound views thus expressed by Chief Justice MARSHALL, let us examine the question before us. Congress is expressly empowered to "raise and support armies," and we shall do well to remember that Congress are to be allowed, according to the ruling I have read, to select the means by which armies are to be raised and supported. In selecting the means to accomplish these things, we find pay, bounties, and pensions are stipulated and promised to the soldier. Through these means, thousands who could not otherwise afford to leave all and enter the military service, come forward, enlist, and do battle to protect and defend the rights, interests, and honor of the nation. By the use of these means the government is enabled readily to raise an army and fill its ranks from time to time.

Pensions and bounties are not given for the support of the army, but promised by way of inducement and reward for the citizen becoming a soldier and faithfully serving his country. There is no express power given in the Constitution to Congress to give pensions or bounties to the soldier. The right is claimed, however, and has never been doubted as being within those incidental or implied powers flowing from the expressly granted or enumerated power, to "raise and support armies." They are among the means which it selects in the exercise of a granted power, and I apprehend Congress is the sole judge as to what means are appropriate and to be selected in the exercise of any of its enumerated powers. Most of the penal laws of the government of the United States rest upon the incidental or implied powers of Congress to punish violations of its laws. It was well argued by the district attorney, that under the power to regulate commerce, Congress has passed laws regulating vessels engaged in carrying passengers, in prescribing the size of state-rooms and otherwise, as well as in requiring vessels to convey disabled

American seamen found in a foreign port to this country. And, again, laws forbidding the sale of bounty certificates, as well as many other statutes of a like character, none of which have been held unconstitutional, nor judicially questioned, so far as I know; and yet these statutes find no sanction in the Constitution of the United States other than in the implied powers, and the general provision "to make all laws which shall be necessary and proper for carrying into execution" the powers vested in the government.

If, then, Congress may promise bounties and pensions to the nation's soldiers, may it not, by appropriate penalties, guard those rewards against him who would divert them in any manner away from the beneficiary? If the soldier may lawfully be promised bounties and pensions, and if, from his occupation of arms and want of the requisite knowledge, he must employ another to prepare the requisite evidence to the pension office to bring him within the law and secure the promised bounty and pension, may not the government say to such employee, This money we pay to you for one of our soldiers, and you must pay it over to him intact; failing in which you make yourself liable to fine and imprisonment? True, the employee is the agent of the soldier in all that he does for him, but he must deal with the government in the exercise of that agency; and in taking such employment to secure for the discharged soldier his bounty or pension, he knows the restrictions placed by Congress upon the compensation he can receive, and the prohibition against his retaining any portion of the funds from the soldier. These provisions may be regarded as the terms and conditions upon which the government consents to recognise the agency of the person employed by the soldier and pays the money over to such agent. Congress must alone be the sole judge of what is both necessary and expedient on any subject within the range of its powers to act.

"To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end."

Congress has employed a means in raising and supporting armies, in addition to pay, clothing, &c., bounties and pensions, and has sought by appropriate penalties to guard these moneys through all channels from the nation's treasury into the hands of the pensioner.

Said the Supreme Court, in the case already referred to, "let

the end be legitimate ; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

I have endeavored to show, not only that the end which the statute under consideration seeks is legitimate and within the scope of the Constitution, but that the means employed by Congress are appropriate and adapted to the end of raising and supporting armies, and therefore within the powers of Congress under the Constitution. Without entering upon a discussion, whether the state may, in view of the legislation of Congress, impose a penalty upon the citizen for withholding the money in question, and alone regulate and control contracts between citizens of the state in reference to compensation for such services as those by Fairchilds for Penrose, it will be recollected that a law of Congress, if constitutional, prohibits and supersedes all state legislation on the same subject: 1 Parker C. R. 67. That while the state law might control in reference to these questions in the absence of any exercise by Congress of its constitutional powers on the subject, yet so far as Congress does constitutionally act, the state laws are so far superseded, and the citizen cannot be punished by both sovereignties for the same offence. .

Sections 12 and 13 of the Act of Congress are held to be constitutional ; the demurrer is overruled, with leave for defendant to plead to the indictment.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF NEW HAMPSHIRE.²

SUPREME COURT OF NEW YORK.³

SUPREME COURT OF PENNSYLVANIA.⁴

BROKER.

Earning of Commissions.—A real estate broker is the agent of the

¹ From J. William Wallace, Esq. ; to appear in Vol. 6 of his Reports.

² From the Judges of the Court. The volume in which they will be reported cannot yet be indicated.

³ From Hon. O. L. Barbour ; to appear in Vol. 49 of his Reports.

⁴ From P. Frazer Smith, Esq., Reporter ; to appear in 54 Pa. State Rep.

vendor. There must be an employment to constitute him an agent, and his services however slight must be the efficient cause of the sale : *Earp v. Cummins*, 54 Penna.

If the mere introduction of the property of the buyer, an advertisement or any other service be the immediate and efficient cause of the bargain, the broker earns his commissions : *Id.*

But if the services of the broker do not accomplish a sale, and after the proposed purchaser has decided not to buy, other persons induce him to buy, the broker has no right to commissions : *Id.*

CONTRACT.

Affirmance and Rescission.—When a plaintiff is in a condition to rescind a contract he may recover back in *assumpsit* the money paid on it : *Crossgrove v. Himmelrich*, 54 Penna.

Where an action is in disaffirmance of a contract to recover back the price paid, and it appears that the plaintiff has complied with his part, up to the time of electing to rescind, tender or offer of the money which would have been due on completion is not essential : *Id.*

Where an action is in affirmance of a contract, an offer of readiness to pay is material : *Id.*

CORPORATION.

Effect of Forfeiture of Charter on Debtors of the Corporation.—Where a bank charter is forfeited by *quo warranto* and the corporation is dissolved, and a trustee appointed by judicial order made under statute to collect the debts due to it and apply them to the payment of debts which it owes, does so collect them and pay—any surplus, by the laws of Mississippi, and by general laws of equity, will belong to the stockholders : *Bacon v. Robinson*, 18 Howard, affirmed : *Lum v. Robertson*, 6 Wall.

A delinquent debtor cannot, in such case, plead the judgment of forfeiture as against a trustee seeking to reduce his debt to money for the benefit of the stockholders ; nor (having no meritorious defence) plead that a subsequent trustee in the settlement of the bank's concerns, has no right to sue, because the first one was discharged, his duties being accomplished ; the second one having been appointed (after a decision by this court declaring that he could be rightfully appointed) for the purpose of completing the trust by collecting the surplus assets and distributing among the stockholders : *Id.*

Paying in of Capital—Liability of Subscribers.—By the act of subscribing to the capital stock of an incorporated association, each associate undertakes to raise his proportion of the capital as it may be called for by the directors : *The Merrimac Mining Co. v. Levy*, 54 Penna.

The law authorized the directors to call in the subscription, this ordinarily implies a corresponding duty to pay : *Id.*

The articles of association under the law, contemplated a substantial capital for defined purposes ; this was both to carry out the object of the corporation and for the protection of creditors, and therefore created a personal liability for the subscriptions : *Id.*

A purchaser from an original subscriber is substituted to his obligations as well as his rights, and, being accepted by the corporation, a privity is established between them : *Id.*

Canal Co. v. Sansom, 1 Binn. 70, and *Pulmer v. Ridge Mining Co.*, 10 Casey 288, criticised: *Id.*

In a suit arising under a charter of another state, the decisions in that state are the best evidence of the rights and duties of stockholders under it: *Id.*

Rights of Stockholders to unissued Stock—Enlargement of Powers.—A corporation was created with a defined capital only part of which was subscribed; the directors had power to receive subscriptions and issue certificates for the untaken stock, and the holders became stockholders and entitled to equal rights with the original stockholders: *Curry v. Scott*, 54 Penna.

If a stockholder has not paid his subscription in full, he owes for what is unpaid, but he is none the less a shareholder: *Id.*

An old stockholder's right to subscribe to the untaken stock is not superior to the right of one who owned no stock: *Id.*

Reese v. The Montgomery County Bank, 7 Casey 78, explained: *Id.*

An Act of Assembly authorizing the issue of preferred stock, if accepted by the stockholders, authorizes such issue by the directors, although individual stockholders may oppose it: *Id.*

The legislature may confer enlarged powers upon the managers of a corporation with the assent of the shareholders, and no one stockholder, by refusing his assent, can hinder the exercise of the enlarged powers: *Id.*

CRIMINAL CONVERSATION.

Consent or Negligence of Plaintiff.—The law is now clearly settled to be that if it appears, in an action for criminal conversation, that the husband consented to his wife's adultery, it goes in bar of the action: *Bunnell v. Greathead*, 49 Barb.

If he was guilty of negligence, or of loose or improper conduct not amounting to a consent, it goes in reduction of damages: *Id.*

If the husband had it in his power, and neglected to interpose, to prevent the debauchment of his wife, he can recover only the actual pecuniary damages which he sustained: *Id.*

DEBTOR AND CREDITOR.

Fraudulent Conveyance by Debtor in Failing Circumstances.—A debtor, in failing circumstances, cannot, even for a valuable consideration, sell and convey his land, ostensibly without reservation, but really reserving to himself the right to possess and occupy it for a limited time for his own benefit. Nor will this rule of law be changed by the fact that the right thus to possess and occupy for the limited time is a part of the consideration of the sale; the money part of it being made, on this account, proportionably less: *Lukins v. Aird*, 6 Wall.

EASEMENT.

Surface Rights in Land.—A grant of a surface right with a stipulation that it shall not be "for the purpose of laying out a town or building thereon, but only for the purpose of a coal-breaker and dirt-room for the deposit of coal-dirt," is the grant of an easement only although in fee: *Big Mountain Improvement Co.'s Appeal*, 54 Penna.

An easement is a liberty, privilege, or advantage which one may have in the lands of another without profit: *Id.*

EQUITY.

Equity Practice and Jurisdiction—Adoption by Federal Courts of State Practice.—Though usually where a case is not cognisable in a court of equity the objection must be interposed in the first instance, yet if a plain defect of jurisdiction appears at the hearing or on appeal, such court will not make a decree: *Thompson v. Railroad Companies*, 6 Wall.

Though state legislatures may abolish in state courts the distinction between actions at law and in equity, by enacting that there shall be but one form of action, which shall be called "a civil action," yet the distinction between the two sorts of proceedings cannot be thereby obliterated in the Federal courts. Hence, if the civil action brought in the state courts is essentially, as hitherto understood, a suit at common law, the common-law form and not an equitable one must be pursued if the case is removed into a Federal court: *Id.*

Nor does the fact that by statute in the state courts "the real parties in interest" must bring the suit, whereas in the Federal courts in a common-law suit, such as was presented in the civil action brought in the state courts, one party would sue to the use of another, change this rule. A plaintiff in the state court may remain plaintiff on the record in a Federal court, and prosecute his suit in that court as he is authorized by state laws to prosecute it in the state courts: *Id.*

INSURANCE.

Floating Policy.—Four insurance companies insured machinery, &c., in buildings in a described enclosure with the following condition annexed to their policies: "If at the happening of any fire the assured shall have insurance under a floating policy or policies, not specific, but covering goods generally in various places, not designated, and yet within limits which include the premises or property herein insured, such policy, as between the assured and this company, shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurances thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess." Other insurance companies insured on *specific* property in the same enclosure. In a loss by fire, *held*, that the liability of the four insurance companies was not confined to the *excess* of loss above that covered by the specific insurances: *Merrick v. Germania Fire Insurance Co.*, 54 Penna.

The four companies were liable to contribute rateably on the property insured in the specific policies which was covered by their general policies. Per THOMPSON, J.: *Id.*

Where the underwriters have left their design doubtful by using obscure language, the construction will be most unfavorable to them: *Id.*

LANDLORD AND TENANT.

Where the landlord and owner of premises in fee, claiming that the

term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands, and attempt to dislodge the former by force. The landlord, being in the actual possession, has a right to maintain it, and to use force, if necessary, for that purpose: *Sage v. Harpending*, 49 Barb.

LIMITATIONS, STATUTE OF.

Commencement of Suit.—A suit is to be regarded as commenced so as to avoid the Statute of Limitations, when the writ is completed with the purpose of making immediate service: *Mason v. Cheney et al.*, Sup. Ct. N. H.

If completed except affixing a revenue stamp, but the purpose is to serve it without, the suit will be regarded as commenced at the date of the writ: *Id.*

But if retained several days for the want of a stamp, and then it be affixed, and nothing more is shown, the suit must be considered as commenced when the stamp was affixed: *Id.*

MANDAMUS.

Granting, a matter of Discretion.—The granting or refusing of the writ of *mandamus* is a matter of discretion. To entitle a party to that remedy, there must be a clear legal right, not merely to a decision in respect to the thing, but to the thing itself: *The People, ex rel. Duff, v. Booth, Mayor of Brooklyn*, 49 Barb.

Where it is doubtful whether a person in whose favor a warrant is drawn upon the treasurer of a city, by the comptroller, is entitled to the money, there being another claimant, who has sued the city therefor, the mayor is not obliged to sign the warrant; and cannot be compelled to do so, by *mandamus*: *Id.*

MILITARY SERVICE.

Quota—Deserter.—The facts that a person has enlisted, been mustered into the military service of the United States, and has since deserted, may be proved by evidence other than the record. Parol proof that such person served as a soldier for several weeks, and that he then deserted, has a legal tendency to prove the enlistment, mustering in, and desertion. Upon proof of a custom of the trade known to the parties, by which the substitute broker was understood to warrant that the substitute was not a deserter, it will be taken that the contract was made in reference to such custom, and a warranty will be implied: *Town of Lebanon v. Heath*, Sup. Ct. N. H.

Where a town paid to such broker money for a substitute who afterwards proved to be a deserter, and was dropped from the credit of the town, it was held that the sum so paid might be recovered back in an action for money had and received: *Id.*

MINING LEASE.

Covenants—Damages.—In a lease of a coal-mine, the lessee stipulated that he would pay a rent for coal taken out and also mine a certain number of tons annually. *Held*, that settlements for coal taken out, were

not as matter of law a discharge of a breach in not taking out the stipulated quantity: *Powell v. Burroughs et al.*, 54 Penna.

The covenant for rent for coal mined, was distinct from the covenant to mine a certain quantity: *Id.*

Two mines belonging to the same lessors, the one contiguous to the other, were leased by two leases to one lessee. One stipulation in each lease was that the lessee was not bound to mine more coal than could be taken away by cars furnished by a railroad company named. It was no excuse for not working one mine that the cars furnished, were not sufficient to take away the coal mined in the other: *Id.*

That the coal which the lessee failed to take out according to his covenant, was of greater value to the lessor at the end of the lease than if it had been taken out, is not a ground for reducing the claim for the breach to nominal damages: *Id.*

The rent per ton agreed for was stipulated damages to the extent of the non-performance: *Id.*

The uncertainty as to the extent of the injury, is a criterion to determine whether it is a penalty or liquidated damages: *Id.*

NEW TRIAL.

Practice—After-discovered Evidence.—A new trial will not be granted on the ground of newly discovered evidence, where the party who has lost the verdict has a right to the new trial by review, unless the newly discovered evidence has been kept from his knowledge by the misconduct of his adversary: *Ordway v. Haynes*, Sup. Ct. N. H.

PLEADING.

Payment an affirmative Plea.—If the defendant relies upon payment as a defence, either upon the general issue or a special plea, the burden rests upon him to prove payment: *Kendall v. Brownson*, Sup. Ct. N. H.

If the court in their discretion allow leading questions, it will be presumed, unless the contrary appears, that there was a proper case for the exercise of the discretion: *Id.*

REPLEVIN.

Avowry for Rent.—In an avowry in replevin for rent in arrear, the rent reserved must be accurately stated, the rent in arrear need not be: *Phipps v. Boyd*, 54 Penna.

Waltman v. Allison, 10 Barr 464, remarked upon: *Id.*

An averment in an avowry that the plaintiff held under a lease reserving to the defendant a specified rent, is supported by evidence of a lease to the plaintiff by a former owner reserving the described rent, and that such owner had conveyed to the defendant: *Id.*

Rent may be described as reserved to the reversion: *Id.*

That the leased premises had been conveyed after the lease to defraud creditors, is no defence by the lessee against the avowry of the grantee: *Id.*

None but those intended to be postponed or defrauded are within the protection of the statute of Elizabeth: *Id.*

SHIPPING.

Master's powers to sell his Ship in a distant Port—Divesture of Liens on it—Title passing by Possession taken after Sale.—In order to justify the sale by the master of his vessel in a distant port, in the course of her voyage, good faith in making the sale, and a necessity for making it must both concur; and the purchaser, before he can make out a title, must show their concurrence. The question is not whether it is expedient to break up the voyage and sell the ship, but whether there was a legal necessity to do it. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed and the perils to which the property is exposed: *The Amelie*, 6 Wall.

Where the sale of a vessel owned in Amsterdam was made by public auction, at Port au Prince, after a careful survey by five persons—one the British Lloyd's agent, another the agent of American underwriters, and the remaining three captains of vessels temporarily detained in port—the whole appointed by and acting under the authority of the consul where the vessel was owned, which five surveyors unanimously agreed that the vessel was not worth repairing, and advised a sale of her, the sale was held good—no evidence being before the master that the report was erroneous—although the master did not consult his owners at Amsterdam, and though the vessel, afterwards, at a vast expense—greater, as the court assumed, than her new value—was repaired and went on to her original port of destination, and thence abroad with another cargo: *Id.*

A valid sale by the master of his ship in a distant port, divests all liens upon her: *Id.*

A bill of sale by the master is not essential to pass mere title. The sale followed by possession taken does this: *Id.*

STREETS.

Report of Commissioners of Estimate and Assessment—Power of Commissioners.—After the report of commissioners to estimate the expense, and assess the damages, of widening a street in a city have been appointed and have made their final report of estimate and assessment, which has been confirmed by the County Court, and the proceedings have been reversed, on *certiorari*, by judgments of the Supreme Court, such commissioners have no power to file another report of estimate and assessment, in the same matter; their appointment being annulled by such judgment, and the commissioners being thenceforth *functi officio*: *The People v. The City of Brooklyn*, 49 Barb.

TEXAS.

Annexation—Alienage of Citizens of United States—Texas Statutes of Fraud and of Limitations.—A citizen of the United States, and who, as such, was of course before the admission of Texas into the Union, an alien to that republic, and so, as against office found, incompetent to hold land there, became on the admission, competent, no office having been previously found: *Osterman v. Baldwin*, 6 Wall.

A purchaser at sheriff's sale buys precisely the interest which the

Declarations of the executor, who was also plaintiff in the issue, and whose interest under the will was less than under the intestate laws,—made before the will was made, are not evidence against the will: *Id.*

A subscribing witness who has been examined to the execution of the will, may be examined in rebuttal on the competency of the testator: *Id.*

A subscribing witness may give his opinion of the testator's capacity without the facts on which it is founded,—other witnesses may not; but after they have testified to the facts, their opinions may be placed before the jury: *Id.*

WITNESS.

Evidence to contradict or explain.—A party is not permitted to assert, or to present evidence to show, that one statement of facts is true, and afterwards to assert, or prove to the court, that his prior evidence was untrue, or not to be relied on. But where a witness has given evidence against the side for the support of which he has been called, and the court can perceive good grounds for apprehending that the witness has testified under a mistake of the facts, or, unintentionally, falsely, and there is no bad faith on the part of the party producing the witness, he is allowed to give evidence explaining or even contradicting his own witness: *The People v. Skeeham*, 49 Barb.

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THE
AMERICAN LAW REGISTER.

APRIL, 1868.

THE FORMAL OPENING OF THE TERMS, AT WESTMINSTER HALL—LINCOLN'S INN AND THE COURTS OF CHANCERY—CHANCERY APPEALS—APPEALS TO THE HOUSE OF LORDS—RAILWAY MANAGEMENT—DIVIDENDS PAYABLE ONLY OUT OF NET EARNINGS—COURTS OF EQUITY WILL ENJOIN DIRECTORS FROM PAYING THEM OTHERWISE—PRIVILEGE OF PARLIAMENT—HOW FAR EDITORS AND PUBLISHERS PRIVILEGED, AS TO REPORTS AND LEADING ARTICLES.

I. It is not, perhaps, generally known to the American Bar with what degree of formal ceremony the different terms of the superior courts are opened, at Westminster Hall. The judges, all in full court dress, small-clothes and dress sword, and *chapeau bras*, and full-bottomed wigs, and the counsel of every grade, from the Queen's Advocate and the Attorney-General, down through the several degrees of sergeants and Queen's Counsel, to the humblest barrister, called to the bar but yesterday, all repair to the dwelling of the Lord Chancellor, to make their respects to the highest judicial dignitary of the realm. After a formal breakfast, near mid-day, in solemn procession, they take possession of the old hall, where the Aula Regis held its sessions almost from the time of the Conqueror. After formal opening of the several courts, an adjournment for the day follows, and all prepare for business on the next morning, at ten o'clock, or earlier if need be. The late Lord Justice Knight Bruce never attended these ceremonious openings of the term, from an invincible aversion to appearing in

small-clothes. We conjecture some of his successors are coming to have similar feelings.

It is at Lincoln's Inn, where, after the ceremonious opening of the term by the Lord Chancellor at Westminster Hall, the Courts of Chancery continue their ordinary sessions, and where all chancery causes are heard and determined. It may not be known to all American lawyers, that all the Courts of Chancery, with the exception of that of the Rolls perhaps, are but departments of the Court of Chancery, where the Lord Chancellor's authority is the paramount one. For instance, the three Vice-Chancellors are, in contemplation of law, sitting merely as assistants to the Lord Chancellor. So too, in the Court of Chancery Appeal, which, in point of fact, is generally held by the Lords Justices, the Lord Chancellor may preside and claim the assistance of the two Lords Justices. But in that case the Lords Justices sit in the Lord Chancellor's court-room, having another court-room in which they hear appeals by themselves. The mode in which the point is determined, how many of the judges of Chancery Appeal shall sit upon any particular appeal, seems rather singular and unique to all Americans. It seems to depend upon the choice of the appellant. He may carry an appeal from one of the Vice-Chancellors, or the Master of the Rolls, to the full Court of Chancery Appeal, when the Lord Chancellor will call to his aid the Lords Justices, to hear the appeal in the Court of Chancery, when the three judges will be present during the hearing and more commonly give judgments *seriatim*. Or if the appellant, in such cases, for any cause, prefer his appeal should be heard by the Lord Chancellor only, he may take it into that court, to be heard by him alone. So also he may elect to bring his appeal to hearing before the Lords Justices alone, which is the more common course.

Appeals to the House of Lords may be taken direct from the Vice-Chancellors, or the Master of the Rolls, or the party may go first, to any one of the Courts of Chancery Appeal, but he cannot appeal from one Court of Chancery Appeal to another, or from the Lord Chancellor, or Lords Justices, to the full Court of Chancery Appeal, or from the Lord Chancellor to the Lords Justices, or *vice versa*. Each of these courts, in contemplation of law, being considered identical with the others, and hence it has recently been determined that one Lord Justice may hear appeals,

and this is now becoming quite common. The English bar seem to have much less confidence in the number of judges, than is common with us.

Appeals are taken too, as is well known, in a very different manner, and with very different effect, in the English Courts of Chancery, from what is allowed in most of the American states. All interlocutory decisions are appealable, and the proceedings in the case are not necessarily thereby interrupted. In theory, in a chancery cause pending before one of the Vice-Chancellors, or the Master of the Rolls, an interlocutory decision may be appealed to the Lord Chancellor, or the Court of Chancery Appeal, and may be thus progressing, while the cause itself is at the same time making progress in the original court. And at the same time another interlocutory decision may be appealed direct to the House of Lords, and may be there on trial, while other portions of the cause may be on trial in two or more different courts. But this is not the usual course perhaps. This is accounted for partly by the fact that different members of the Chancery bar practise in different courts, and it is not unusual to have a cause argued in different courts by entirely different counsel; but this is by no means always the case. Senior counsel of eminence, like the present Lord Cairns, or Sir Roundell Palmer, more commonly follow an important cause through all its stages—and by consequence the proceedings in the court below are more commonly stayed by consent, during the pendency of the appeal.

II. Some very important questions have, within the last few weeks, come before the superior courts in Westminster Hall and Lincoln's Inn. The astonishing discoveries, in regard to railway management, or, perhaps more properly, mismanagement, within the last few months, have brought out the question of the right of the directors to declare and pay dividends, out of anything but the net earnings of the company.

In countries where joint stock companies are owned to a considerable extent by mere speculators and adventurers, it would be not unnatural to expect, that the shareholders would more readily acquiesce in having dividends paid out of capital—and even out of capital borrowed for the express purpose—than in countries where such stocks are held, to a large extent, by those who desire to retain them, as a means of investment, and for permanent income. In the latter case—and this seems the only view with

which any such stocks could fairly be created—it would at once destroy the credit of the stocks and defeat the just object of their creation, if dividends, to even the slightest extent, were permitted to be paid out of capital, whether borrowed for the occasion or not. There cannot be a practice more disingenuous, or fraudulent in its character, than this. If permitted, in any case, or to the slightest extent, it would at once subvert the entire system of fair dealing, in the shares of joint stock companies. So far has this cardinal principle of finance been carried, that any state, or government, which allows the interest upon its capital, or funded debt, to be paid by new loans—which is but another name for new capital—will at once lose credit; and cannot expect the confidence of capitalists to be continued under such a practice.

But this practice in the case of a government, or state, might be justified under some special crisis or emergency. For the payment of interest, in such cases, is not so exactly the measure of the resources of the debtor, as in the case of a joint stock company. The state, or government, in one sense, possesses unlimited resources—or such as are measured only by the productive industry of all its inhabitants. In this case the fact of paying interest by new loans, is only a symptom of bad management and thoughtlessness; or of unwillingness to impose the just weight of the due and exact responsibility and current cost of the government upon the resources of the state. And the opposite course, of raising current interest annually, is indispensable as an undoubted expression of willingness, on the part of the state, in its aggregate capacity, to meet its just responsibility, in the present tense.

But in the case of a joint stock company, the resources of the company are of necessity limited, and can only be measured by the sole and unerring standard of its net earnings, that is, the income remaining over and above all outgoes. If the directors are allowed, under any pretence or excuse, to tamper with this cardinal measure of character, there is no longer any standard or measure of character remaining. The payment of dividends and interest upon its capital, whether in shares—ordinary or preferred—or in bond and mortgage, or in any other form, is as indispensable to determine the success or failure of joint stock companies, as the prompt meeting of one's promises is with a natural person. And, while the flexible morality of trade allows

some discretion to the unfortunate dealer, in calling in the temporary aid of friends, in order to defer the inevitable day of ultimate failure, or, if possible, to help escape from its disheartening disaster, no such discretion is, or can be, allowed to the managers and directors of a joint stock company, like a railway.

There are, unquestionably, some uncertainties in regard to railway management, whereby it becomes difficult, if not impracticable, in all cases, to know precisely how much to charge to current expenses. The repair and renewal of permanent structures—like the roadway, bridges, and, to some extent, stations and machine-shops, which are constantly deteriorating, and must ultimately be renewed by an outlay far beyond the cost of ordinary repairs, calculated on the most liberal scale—these, and some other perplexities and uncertainties, naturally attending railway management, in the most competent and watchful hands, will always plead for some allowance for occasional failures and shortcomings. But beyond this there is an invariable and inflexible rule of railway management, from which the English courts will allow no departure.

In a recent case before Vice-Chancellor Wood, where the minority of shareholders sought for an injunction, restraining the directors and other shareholders, in whose interest they were acting, from borrowing money on a temporary loan, or applying money already borrowed, to the purposes of paying the regular semi-annual dividends upon the shares, in advance of realizing some suspended sources of income, the learned judge granted the injunction without hesitation. And the principle is so unquestionable, that an appeal would offer no reasonable hope of obtaining any modification of the order, and was not attempted, we believe.

But we fear there has been a very great amount of railway management, both in England and America, which would be found, on careful examination, far more flagrant than this. It is to be feared that, in the great majority of instances, dividends have been paid, without any very strict regard to the precise rule of measuring them by the exact amount of net earnings. And that if any surplus has been laid by for extraordinary expenditures, it has been sometimes for the very questionable purpose of "legislative expenses," which, if not wholly illegal and inadmissible, were clearly so, when carried to the enormous extent, and for the

questionable objects, which too many recent developments indicate. And in other cases dividends have been paid, out of borrowed capital, for the mere purpose of misrepresenting the real state of the productiveness of the business, when afterwards it was found that the disclosure of the exact facts of the case must seriously have reduced the price of the shares in the market, thus in effect making the directors accessory to the false representations under which the stock would be or might have been offered for sale. Such conduct, while it might be quite innocent on the part of sellers, is scarcely less than felonious on the part of the directors, and should be visited with condign punishment.

We have been accustomed to commend the fairness and faithfulness of English railway management, but it now appears that rust and rottenness have been gathering at the heart of it for many years, and that it is, if possible, even more hollow and fallacious than that in our own country. And it has been done so covertly and under the guise of such fair pretensions, that it has misled even the most wary. It seems baser, if possible, for one whose reputation stands at the highest point, to abuse this accumulated capital of credit and fair repute to the accomplishment of some nefarious scheme of iniquity, than for one who is new in the market, and has only his fair promises to draw upon, to attempt the same thing. And it is certain the former will be much more sure of success than the latter. It is this which seems to create such fierce indignation against almost all the English railway directors just at the present moment. For as one after another comes to be probed the same disgusting rottenness at the core is brought to light, so that, at present, there is really no firm ground to stand upon, so far as the credit of railway capital is concerned. It is to be hoped we shall profit by the example of our English cousins, and while we imitate their excellences avoid their errors.

III. The trial of the case of *Wason v. Walter*, before the Lord Chief Justice of England and a special jury, at the sittings after Michaelmas Term, was one of considerable interest to the proprietors of the press. The defendant is the proprietor of the *Times* newspaper, the chief organ of popular sentiment in England, which, like one leading paper in America, is always sure to echo popular sentiment, if sufficiently developed to be comprehended. The plaintiff is a member of the English bar, and a former member of Parliament from one of the country constitu-

encies, where the election, thirty or more years ago, was contested by Sir FITZROY KELLY, the present Chief Baron of the Court of Exchequer. At the time of his promotion to the bench, his former competitor saw fit to present a petition to Parliament against the appointment, charging that Sir FITZROY KELLY, in some trial before a committee of the House of Commons, had been guilty of perjury, in denying all knowledge of or acquaintance with one person, who had canvassed for him during the election, and in doing so had been guilty of bribery—on which ground the return had been avoided. But the charge was promptly met by the Lord Chancellor and Lord St. LEONARDS, who effectually vindicated the Lord Chief Baron from all suspicion of guilt, on account of the charge, showing, beyond all question, that the charge had been preferred, and clearly refuted, at or near the time the offence was said to have been committed, and that Mr. Wason had remained silent during all the previous stages of the learned Baron's promotion to be solicitor and attorney-general, until his call to the bench; and that the charge was now brought forward at a time and under circumstances, as it was claimed by those noble Lords, clearly indicating some wrong motive, and stating many facts and circumstances in confirmation of their views, which Mr. Wason naturally regarded as libellous.

But as members of the House of Lords were privileged for all words spoken in debate, the aggrieved party could obtain no redress in that quarter. But as the Times had published detailed reports of the speeches made by the noble Lords, and had inserted also leading editorial articles, extensively discussing the same grounds of defence against Mr. Wason's charges, and repeating, to a considerable extent, the charges which Mr. Wason regarded as libellous, he very naturally sought redress against the proprietor of the Times, to whom he did not suppose the privilege of Parliament could extend; or if by possibility it might be claimed to extend thus far, for any purpose, he expected it would, at all events, not be carried beyond that of giving a report of the actual proceedings in that body. What then must have been his disappointment, not to say consternation, to hear and feel the learned Lord Chief Justice hewing down and cutting away the very last timber in the platform upon which he felt that he stood so securely. One cannot help feeling a certain degree of sympathy,

if not of actual commiseration, for the sad condition in which the plaintiff thus unexpectedly found himself. And it seems, so far as we can judge from the newspaper reports in the case, to have operated so severely upon the plaintiff, at the time, as nearly to deprive him of that iron, not to say leaden, self-possession, which he preserved so imperturbably, until that critical moment—when all he could utter was, that he did not expect his Lordship to have given the jury any such charge, and he trusted it would not be regarded as disrespectful or out of place, that he should take exception to the same, and ask to have it revised, in banc.

But here again the redoubtable suitor, who seemed to have verified the truth of the maxim, applied to counsel who conduct their own causes, was so seriously embarrassed by the peculiar juncture of affairs, that he failed to make up any bill of exceptions to the charge (as given), which could fairly be construed as any objection to its most damaging and destructive current. For, after the learned judge had utterly demolished the entire superstructure of the plaintiff's case, the jury, instead of retiring and remaining out a reasonable time, so as to show at least some compunctious regrets at the utter lawlessness of the liberties accorded by the learned judge to the press—not only in the matter of parliamentary reports, but of commentaries thereon, however damaging or offensive to personal pride and self-respect: instead of this only decent regard for the plaintiff's embarrassed position, the jury did not retire at all, but after a deliberation of less than two minutes announced themselves as ready to give a verdict in the case, for the defendants, of course. All this transpired in less time than is required to write it, and long before the plaintiff had sufficiently recovered from his very natural surprise, not to say horror, at the perplexing circumstances by which he found himself surrounded.

And now, to cap the climax of his embarrassment, the noble and distinguished Lord Chief Justice of all England, instead of allowing the perplexed suitor time to recover himself, and draw up formal and effective exceptions to the terrific charge, required it to be done, *instantly*, and before the verdict should be delivered. This was, indeed, to require a man to go through the detail of a dress parade, not only in the face of the enemy, but at the very mouth of a battery of cannon, from whose fatal and

destructive discharge there could be no escape, either by advance or retreat. What wonder then that the exceptions should be found fatally defective?

This is the more to be regretted, since the men of the press, although well satisfied to find in the chief judicial officer of the common-law bench of England so decided and unwavering a champion, would certainly feel more sure of their ground if the question had been so placed upon the record, as to enable the defeated party to carry it to the court of last resort. And it is even now competent for the learned judge to certify the main features of the charge, for revision by his brothers of the same court, where, if regarded as involving serious doubt, it would be sure to be ordered into the Court of Exchequer Chamber, and might readily be brought to the House of Lords, for final indorsement or reversal.

The main features of the charge were: That any publisher of a daily paper, or any other publisher, was justified in giving fair and faithful report of the proceedings and debates in either house of Parliament, and that no action of libel could be maintained for anything contained in such report, provided it were honestly and fairly put forth, for the *bond fide* purpose of giving information of what passed in Parliament. And that, as to leading articles, newspaper publishers had, to a certain extent, privilege of discussing such public questions, as they might fairly consider the public felt an interest in hearing discussed; and in doing so they might put forth such views and maintain such constructions as they deemed just and right, and that they were not responsible for the entire and absolute truth and justice of all they might utter, provided they acted in good faith and without malice.

In the present case, the defendants having pleaded the general issue, and there being nothing before the court to show the truth of all the matters of fact contained, either in the report of what passed in the House of Lords, or in the defendant's comments in his leading articles thereon, it must be assumed that any portion of the same which was libellous might also be false. It could only therefore be justified upon the ground, that the defendant's privilege extended to the publication of all which passed in Parliament, and to such comments thereon and such repetition and amplification of such charges as come fairly within the scope of an editor and publisher, actuated by the honest and *bond fide*

purpose of instructing and informing the public in regard to such matters of public concern as he may properly consider that they have a *bonâ fide* interest in correctly understanding, provided he be actuated solely by the motive of rendering his paper a fair and faithful instructor in regard to and commentator upon such matters, and not by any sinister and malicious motive towards those thereby exposed to opprobrium. This is, indeed, a very broad shield, a privilege scarcely less than that of the member of Parliament. But we do not well see how it could be much narrowed, without restricting it within such limits as to render the privilege of no avail. It is well, perhaps, that the freedom of the press should cover all matters of public concern, where the publisher is actuated solely by a desire correctly to instruct the public mind, and by no spice of personal malice.

L. F. R.

LONDON, December 27th 1867.

THE BANKRUPT ACT. A COMPLIMENT TO AMERICAN
LEGISLATION.

HAVING been assured that the bankruptcy bill now pending in the English Parliament, was to a great extent copied from the act now in force in the United States, we have taken some pains to authenticate a fact so honorable to American legislation and reflecting such credit upon the accomplished author of our act, the Hon. THOS. A. JENCKES, of Rhode Island. The following is believed to be a correct statement of the facts.

Ever since the passage of Lord Westbury's Act in amendment of the bankrupt laws, in 1860, efforts have been made each session of Parliament, to rid it of some of its cumbrous and expensive features, and to simplify its details, which were found to be almost as burdensome as the provisions of the previously existing bankrupt laws. A special committee was appointed to inquire into the working of the law, which took considerable testimony on the subject, and, in 1865, after the first draft of our bankrupt bill had been made public and had passed the House of Representatives, made a partial report recommending amendments to Lord Westbury's Act. More than three-fourths of these proposed amendments had already been incorporated into the bill before

Congress. That committee expired with the Parliament, but immediately on the assembling of the new Parliament a new committee was raised, and at the session in the summer of 1866, after the bill which has since become the bankrupt law of this country had passed our House of Representatives, a bill consolidating and amending all the English bankrupt laws was reported to the House of Commons by Sir Roundell Palmer and Sir George Grey, from the committee, which contained some other provisions similar to those in our law. That bill fell with the Gladstone ministry, but the committee was continued, and, in April 1867, after our bill had become a law, an entirely new bill was reported to the House of Commons, and is now pending there, which closely resembles our law in its structure and in the great majority of its details, and also in its analysis, method, and language.

Many provisions of our law had been taken from the English statutes of bankruptcy, with modifications of language, and when these provisions were retained in the new bill, the new language of our statute also appears. The most striking point of resemblance is in the machinery by which the law is carried into effect. The English laws are administered by commissioners and registrars, who have fixed places of holding court, and before whom the proceedings are dilatory and expensive. The simple device of making the registers in bankruptcy under our law movable, like a Yankee Probate Court, and requiring them to act without delay, and to report regularly to the court, and always to be under control of the court, has made possible the successful practical working of a bankrupt law in this country. The new English bill provides for precisely such a system in England. A court of bankruptcy is established in London in the metropolitan district, and in the country the county courts are made courts of bankruptcy, just like our district courts, and the registrars of these courts perform the same functions as our registers. The old commissioners and registrars are not removed, for that would require an indemnification to them by pensions, but they are to perform, while they live, the same duties as the registrars of the county courts, and when they shall all have died out, the system will be homogeneous like ours. A Court of Appeal in Bankruptcy has the same powers and jurisdiction as our Circuit Courts. There has been almost as great a difference between a register's court of bankruptcy in this country and a commissioner's or registrar's

court in England as between a Yankee Probate Court and the Court of Arches, but our simple device has commended itself to the learned lawyers charged with the preparation of their new bill.

There are some provisions in the proposed English Act which are new, and are decided improvements on any other English system, but which are not well adapted to the circumstances of this country. These also seem to be encumbered with a machinery which must prove dilatory and expensive in operation, and the bill was recommitted to the committee for modification in these respects and to report at the session to be held during the present month (February 1868). It is expected that the bill will then be brought before the House of Commons by the Attorney-General, and some explanation of its history and composition may be expected in his opening speech.

J. A. J.

RECENT AMERICAN DECISIONS.

United States Circuit Court, Northern District of Ohio. January Term, 1868.

JEREMIAH ENSWORTH v. THE NEW YORK LIFE INSURANCE CO.

In a suit brought in *assumpsit* for breach of a contract between an insurance agent and his insurance company, by which it was agreed that he should receive a percentage on all renewals of policies procured by him as long as such policies remain in force: *Held*, that the action may be sustained as upon a contract indivisible, and testimony will be admitted to show the probable expectancy of the duration of such policies.

An established custom among insurance companies as to an agent's property in lists of policies procured by him may be introduced to explain such contract.

THE plaintiff brought his action in a state court, from which the defendant, The New York Life Insurance Company, caused the same to be removed, under the provisions of the Act of 1789, to the Circuit Court of the United States.

The plaintiff was in 1861 appointed defendant's agent at Cleveland, Ohio, and an agreement made by which he was to receive 10 per cent. on first premiums, on policies procured by him, and 5 per cent. on the renewal premiums, as long as such policies should remain in force. In February 1865, the plaintiff was dis-

missed from the agency, on the ground that he engaged in procuring policies for another company, although there was nothing in his agreement, or acceptance of the agency, which specifically forbade his doing this. During his agency he had procured fifty policies, a majority of which were for the lives of the insured, and the remainder required premiums to be paid for ten years. Some had expired by forfeiture, or by the death of the insured. Upon the termination of the agency the collection of the renewal premiums was taken away from the plaintiff, against his consent, and given to his successor. It was shown that the probable expectancy of the life of the policies so procured would be from eight to thirteen years; and taking all the contingencies of forfeitures and deaths into consideration, they would remain in force an average of at least ten years. Also, that a custom prevailed among insurance companies and agents, by which agents acquired a property in lists of policies procured by them.

Plaintiff claimed that the withdrawal of the collection of such premiums on renewals from him, was a breach of the contract by which he had suffered damages to the amount of \$2337.

Wyman & Barlow, for plaintiff, argued that the damages arising from the breach of contract are definite and immediate; are a subject of mathematical calculation; that the list of policies procured by the agent has an intrinsic and market value, and that his damages in consequence of the breach are recoverable at once; and cited 2 Black 590; 31 Verm. 582; 3 Parsons 189.

F. J. Dickman and *S. J. Andrews*, for defendant, claimed the forfeiture by the plaintiff of his right to commissions under the contract by misconduct; that the commissions on renewal premiums to be paid in future, could not be considered in measuring damages; and that actions must be brought yearly for the future commissions.

SHERMAN, J., after reciting the contract, and instructing as to the general weighing of testimony, charged the jury:—That if an agent should grossly misconduct himself in the course of his agency, and should prove unfaithful to his trust, he would forfeit his claim to his compensation or commission—but his misconduct and infidelity must be gross and aggravated before such consequences would follow: ordinary or slight misconduct would not

work a forfeiture of his commissions, although it might be a good cause for a revocation of his agency.

In this case the contract is claimed by the plaintiff to be an entire contract, and that there may be an entire breach; that the damages can be readily ascertained from well-known principles derived from long-used life tables. On the other side, it is claimed to be a divisible contract, and that the breach can be severed into several parts; I know of no general rule of law that would absolutely and definitely determine into which class this particular case would fall, nor can any adjudicated case, similar in all respects to this, be found. If any existed, it would undoubtedly have been found by the learning and research of the counsel. This contract may be said to be a continuing contract; but whether it is an entire or divisible contract depends upon its terms. When a contract is made for the building of a house, and a party refuses to fulfil, it may be considered an entire contract; and one refusal may properly be treated as an absolute breach, and one suit may cover all the damages. On the other hand, a contract to deliver the crops of a farm for several successive years is one capable of division, and several actions may be brought each year for the refusal to deliver the crops.

Again, it has been held and decided, that a continuing contract to pay a sum of money by instalments, or the hire of a laborer by the month for a whole year, is a divisible contract, and may be sued on from month to month, or when the instalments become due and payable. On the other hand, it is well settled that a contract to board, clothe, and support old people during their lives, is one entire contract; and one suit may be brought for the whole damages sustained by a breach. The principle deduced from these cases is, that if a contract is formed of parts which are so far inseparable, that if any one is taken away there is a completed and final breach, then all must be included in the damages; but if the contract is such that it can be separated and divided into one or more distinct and separate breaches, then an action will lie and damages be had for those breaches.

If it be found from the evidence that this contract contemplated that the plaintiff should have the absolute right and ownership in the policies obtained by him, to the extent of five per centum on their renewals during the life of them, and that this right became fixed at the moment and could not be divided from other duties

and other matters; then it is one entire contract, and you must find and fix his damages from the evidence given as to the value of such an interest in the policies. But if the contract contemplated that he was entitled to the commissions on the premiums, only as the policies were renewed from year to year and the premiums paid to the life insurance company, then the contract is divisible, and he can only sue and recover damages after those premiums for renewals are paid in. In this case the plaintiff would be entitled to recover the amount of the commissions on the renewals only down to the day on which he brought his suit.

In this connection, it may be said that a well-established custom among life insurance companies and their agents, as to the kind and extent of property that agents may possess in the lists of policies they procure, may be considered as explaining the contract as claimed, because the parties are presumed to make the contract in reference to that custom.

The verdict rendered was for the plaintiff, damages \$1000, which was the full value of the commissions on the renewal premiums to become due during their estimated probable lifetime, after deducting the costs of collection.

The business of life insurance has within a few years past assumed such surprising dimensions, and the custom of compensating agents by commissions on the premiums obtained has become so general, that the foregoing, although only a *nisi prius* case, will be received with interest by the profession as one of first impression, but quite likely to arise frequently hereafter.

A similar state of facts existed in the case of *Machette v. New England Mutual Life Ins. Co.*, reported in the Philadelphia Legal Intelligencer for May 3d, 1867, though the questions raised were different. In that case the plaintiff Machette claimed to have a contract as agent of the defendant company for a certain percentage on original and renewal premiums, and also that he was "to have the right to collect every such renewal premium, and remit the same to the company, after deducting the said

compensation." The defendant company sent notices to policy holders whose insurance had been procured by plaintiff, that he was no longer an agent of the company, and requiring future renewal premiums to be paid to another person, whereupon plaintiff filed a bill in equity in the Court of Common Pleas of Philadelphia to enjoin the defendants "from interfering with the complainant in collecting the renewal premiums until adequate security is given for the commissions to which complainant is entitled."

An answer was put in by defendants, denying substantially all the equities of the plaintiff's bill, and the injunction was therefore refused; but the court went further, and expressed its opinion that even on the plaintiff's own case, his right to commissions, and his authority to collect the premiums, were distinct and independent privileges, and that while the company could do no act to

deprive him of his right to the former, yet they might revoke his authority for the latter.

The subject of entire and divisible contracts, treated somewhat in the principal case, will be found discussed

briefly, with special reference to employees discharged before the end of the term for which engaged, in the note to *Huntington v. Railroad Co.*, ante p. 147.

J. T. M.

Supreme Court of Iowa.

MORRISON AND STARTSMAN v. MARQUARDT ET AL.

There may be a dedication of land to public use by parol; but the intent to dedicate should in such case be clearly shown.

The sufficiency of evidence to establish a dedication discussed.

The English doctrine that there may be a grant of light and air *by implication* is not applicable to the situation and condition of this country. *Per DILLON, C. J.*

The English rule is this: If a man sells a house with windows and doors opening on to his vacant ground, neither he nor his grantee can afterwards build upon such vacant ground so as to obstruct the flow of light and air without *express reservation* of the right to do so: *Held*, that if such a rule should be recognised in this country, it should be applied only in cases where the circumstances make it clear that such must have been the intention of the parties.

The nature of the conveyances to the plaintiffs; the character of the buildings showing them not to be essentially dependent on the rear windows for light; the nature and effect of previous alienations of adjacent property by the common vendor; the express provision of a four-feet right of way in the rear of the plaintiffs' tenements, were held to be circumstances sufficient to negative any implied easement of light and air over adjacent land retained by the vendor of the plaintiffs.

It is settled law that there is no *implied reservation* of a right to light and air. So that if one sells vacant land and retains the house adjoining, the purchaser of the vacant land may build thereon, though he darken thereby the windows of the house of his vendor.

The owner of the servient estate cannot by the unlawful destruction of an easement extinguish the right of the owner of the dominant estate thereto; and the latter owner may, in proper cases, have relief in equity, and not be driven to an action for damages.

Cross appeals from *Johnson District Court*.

The plaintiffs, Morrison and Startsmen, severally own two brick stores in Iowa City fronting north on Washington street. Startsmen purchased the ground on which he erected his store of the defendant Robinson, there being on it at the time an old frame building. Morrison purchased his present store also of Robinson. These stores are described in the opinion. Robinson in his conveyances to the plaintiffs expressly granted to each of them a right of way four feet in width. This way was located

just in the rear of and adjoining the premises conveyed to the plaintiffs. Robinson also granted to the plaintiffs the right to use a privy which adjoined this right of way, but was situate upon vacant land then owned by Robinson, but afterwards, and quite recently conveyed to the defendant, Marquardt. Robinson sold to the plaintiff Startzman first. He afterwards conveyed to the defendant, Marquardt, a store, fronting west on Clinton street, the rear of which was near to the rear of the store now owned by Morrison.

After the first conveyance to Marquardt, Robinson conveyed to the plaintiff Morrison, still retaining vacant ground in the rear of all of these stores, and south of the four feet right of way. This vacant ground (being the same on which the privy before referred to was situated) he afterwards sold and conveyed to the defendant. Shepherd and Hess owned the ground on the east of that which formerly belonged to Robinson.

After his purchase of this vacant ground, Marquardt, claiming that the privy vault was filled, and the structure itself a nuisance, removed the same, and commenced preparations to extend his store eastward, and clear across the open ground and over the site of the privy, up to the walls of the store of Shepherd and Hess.

If the proposed building should be erected it would be within four feet of the rear windows of the plaintiff's stores—being separated therefrom only by the above-mentioned four feet right of way.

Whereupon plaintiffs, Morrison and Startzman, filed this bill in equity.

Fairall & Boal and *Edmonds & Ransom*, for plaintiffs, claimed, 1st. That Robinson *dedicated* the ground east of the stores fronting on Clinton street and south of the plaintiffs' stores, viz., the vacant ground on which Marquardt now proposes to build, as a court, area, or space to be permanently left and kept open for the use and convenience of said stores.

2d. That when Robinson sold plaintiffs the said property they became by necessity or implication entitled to an easement of light and air, and that this easement will be destroyed by the erection of the proposed addition to his building by the defendant, Marquardt.

3d. That they had an easement in the privy; and that Marquardt had no right to remove or destroy the building.

Plaintiffs prayed an injunction to defendants from building on the open area aforesaid or any part thereof; and that plaintiffs be entitled to have erected and maintained at the expense and costs of said Robinson said privy so removed as aforesaid.

W. Penn Clarke and A. W. Gaston, for defendants.

The answer denied any dedication of the open area; admitted the removal of the privy, and claimed that it was a nuisance and the vault full; also admitted that Marquardt *did propose to extend his store two or three stories in height, east*, but not so as to interfere with the four feet right of way south of plaintiffs' premises; and denied that the proposed erection would substantially interfere with the comfortable or reasonable enjoyment of the plaintiffs' stores as respects air and light.

The cause was referred to a referee whose report was in favor of allowing the defendant to erect a building in the rear of plaintiffs' premises one story in height.

A decree was entered accordingly. Both parties appeal.

Plaintiffs claim that Marquardt should have been restrained from erecting *any* building whatever in the rear of their stores. On the other hand, Marquardt claims that the injunction should have been dissolved and that he should have been allowed to build without *any restriction as to height*. The other questions made appear in the opinion.

DILLON, C. J.—The main principles involved in this cause have never been judicially settled in this state. They are principles of no ordinary importance. The adjudications elsewhere upon the same or similar questions are not uniform. This court is charged with the duty of deciding, which is the better, or what is the true rule in cases of this character.

Before proceeding further it should be observed that the testimony is voluminous and upon some points conflicting. So far as the case involves questions of fact merely, it is not proposed to enter into an extended review of the evidence.

So far as it involves questions of law and principles applicable

to future cases, a more extended examination is not only proper, but is required, both by the importance of the cause itself and the conspicuous ability with which it has been argued by the respective counsel.

It should be further remarked that the defendant admits the existence of the four feet right of way immediately south of the plaintiffs' premises, and claims no right to build thereon; but admits that he proposes to build up to the line thereof.

I. *As to the alleged dedication.*—Plaintiffs insist that the property on which the defendant now proposes to build, was *dedicated* by Robinson as an open area for access to the various stores, as a place whereon to deposit barrels, boxes, &c., and to supply the rear of the stores with light and air. It is claimed also that the defendant knew of this dedication prior to his recent purchase of this vacant ground.

No map or plat showing, and no writing expressing such dedication was ever made.

But plaintiffs contend that there may be a dedication by parol, and that the present is a case of that character.

That there may be a dedication to *public use* without a deed or other written evidence, is undoubtedly true. But in such cases the intent to dedicate should be clear, and the acts or circumstances relied on to establish such intention unequivocal and convincing.

The present case does not meet this requirement. The plaintiffs testify that as an inducement to the purchase of their respective parcels, Robinson stated to them that the area should remain open to the use of all of the stores around it, the same as before. But this is positively denied both by Robinson and Judge Miller, his agent.

It is argued that plaintiffs are corroborated by the almost uniform depth of the various stores, and the fact that the ground had been left open and remained open without objection until about the time this suit was brought. But this is more than overcome by the circumstances that Robinson always claimed to own the open ground in question; paid taxes thereon; exercised control thereover; and by the silence of the conveyances to the plaintiffs respecting any such right as that now claimed.

It appears that the conveyances were made with deliberation

and examined with care before being accepted. They are minute as to other rights and privileges—rights of way, use of privy, &c.,—but silent as to any rights in, to, or over the vacant ground, the alleged dedication of which is now claimed to have been a controlling inducement to the purchasers.

If it was understood that the plaintiffs were to have such valuable rights in this vacant ground, or if it was understood that it was dedicated to their use or that of the public, it is scarcely credible that they would have been satisfied with deeds making specific and anxious mention of “mint and anise and cummin,” yet wholly “omitting the weightier matters” of the contract.

Again, Robinson had not the power to leave it all open as it is claimed he represented he would. For Wheeler had his lease for 99 years, for 90 feet in depth and up to within 20 feet of plaintiffs’ stores. Wheeler might build on or enclose this at his pleasure. He was not restricted as to the *depth* of the buildings to be erected by him.

When Morrison purchased, Marquardt owned the land south of the window in the cellar and lower story of the Morrison building, and this was known to Morrison, and it is not likely he would buy relying upon Robinson’s promise that all the land should be kept open.

The maxim *expressio unius*, &c., or at least the reason upon which it rests, would seem justly to apply here. For why mention a right of way four feet in width, if *all* was to remain open for a rear drive, access, place of deposit, &c.? Again, the weight of testimony decidedly is that the plaintiffs, or at least one of them, wished to purchase of Robinson to build thereon the ground which they now claim was dedicated by him as an open area.

Upon the whole the court is well satisfied that the plaintiff’s claim of dedication is not established. The case is essentially unlike *Maxwell v. East River Bank*, 3 Bosw. 125, 26 N. Y. Rep. 105, and other cases cited on this head by the plaintiffs’ counsel.

II. *As to the alleged easement of light and air.*—The next point made by the plaintiffs is, that it is an established principle of law that if one man builds a house with windows and doors looking over or opening upon his adjoining vacant land, and sells the house, neither he nor his grantee can afterwards build upon

the vacant ground so as seriously to obstruct the flow of light and air to the windows and doors of that house. Plaintiffs do not contend for the English doctrine of a *prescriptive* right to light and air. But the exact position they take as expressed in their written argument, is, "That Robinson, the former owner of the parcels sold to Morrison and Startsman (the plaintiffs), and at the same time of the open ground (subsequently sold defendant, and upon which he proposes to build), having sold to plaintiffs their respective parcels with buildings having windows, cannot afterwards build upon that portion retained by him in such a way as to obstruct the light and air necessary to the comfortable enjoyment of the plaintiffs' buildings, and what Robinson himself could not do, Marquardt, his grantee, cannot.

Defendants' counsel deny that this is an established principle of law.

That this principle is recognised by the English courts admits of no doubt. Mr. Washburn states it thus: "If one who has a house with windows looking upon his own vacant ground, sell the same, he may not erect upon his vacant land a structure which shall *essentially* deprive such house of the light through its windows (Easements, 492, pl. 5).

Speaking of this subject Chief Justice TINDAL (in *Swapsborough v. Coventry*, 9 Bing. 305, C. B. 1833) says: It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights and also possesses the adjoining land, and sells the house to another person, *although the lights be new*, he cannot, nor can any one who claims under him build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is laid down by TWISDEN and WYNDHAM, JJ., in the case of *Palmer v. Fletcher*, 1 Lev. 122, "That no man shall derogate from his own grant." The same law was adhered to in the case of *Cox v. Mathews*, 1 Ventr. 237; by HOLT, C. J., in *Roswell v. Pryor*, 6 Mod. 116; 12 Id. 215, 635, and lastly in the case of *Crompton v. Richards*, 1 Price 27, A. D. 1814.

The doctrine in question essentially rests upon *Palmer v. Fletcher*, *Cox v. Mathews*, and *Roswell v. Pryor*, above cited. The other cases in England follow these as establishing the principle laid down by C. J. TINDAL, in the extract just given.

These cases are very briefly reported; and for convenience,

and that what was decided may be *exactly* seen, are given in a note.¹

The decisions in this country on the exact point as to whether

¹ *Palmer v. Fletcher* (1 Lev. 122, s. c. 1 Siderf. 167, K. B. 15 Charles II.) was an action on the case for stopping lights. *Absente le Chiefe Justice*. A. erected a house upon part of his land, and demised the house to B., and the residue of the land to C., and C., with "*loggs and auters choses sur le terre adjoynant*," so obstructed the windows of the house as to render them dark and useless. It was held that neither A., who built the house, nor C., claiming under him, could stop up the existing windows in the house.

The reason given is, that the grantor of the house could not derogate from his own grant. KELYNCE, J., and TWISDEN, J., differed as to the effect had the vacant land been sold first and the house afterwards. The first contending that in that case the purchaser of the vacant ground might have stopped the lights; the latter denying that this would make any difference. [KELYNCE, J., was right, as shown by subsequent cases: *Tenant v. Goodwin*, 2 Lord Raymd. 1093; *White v. Bass*, 7 Hurlst. & Norm. 722.]

Cor v. Mathews, 1 Vent. 239, was decided in 25 Charles II. It was an action for stopping lights. Lord HALE delivered the judgment of the court, as follows:—

"If a man builds a house upon his own ground, he that hath the contiguous ground may build upon it, although he doth thereby stop the lights of the other house, for *cujus est solum ejus est usque ad cælum*, unless there be a custom to the contrary, as in London." "But if a man should build a house upon his own ground, and then grant the house to A., and grants certain lands *adjoining* to B., B. could not build to the stopping up of A.'s lights in that case." This is all of the judgment, except the remark of his Lordship, "that the present was a plain case, for the defendant fixed boards to the plaintiff's house."

Note: That the case before the court was one where the obstruction to the light was upon land *immediately adjoining*, and the defendant had undertaken to nail up plaintiff's windows.

Roswell v. Pryor, in different phases, was three times before the court: 6 Mod. 116; s. c. 12 Mod. 215, 635. It was decided by K. B. in 2 Anne.

The action was for stopping lights. The question before the court (6 Mod. 116) was one of pleading, viz., whether the declaration was good without saying that the plaintiff's house was an *ancient messuage*. The declaration did not show, though such seems to have been the case, that plaintiff and defendant were lessees under a common lessor.

Lord HOLT's opinion is in the following words: "If a man have a vacant piece of ground, and builds thereupon, and that house has very good lights, and he lets this house to another, and afterwards builds upon a contiguous piece of ground, or lets the contiguous piece of ground to another, who builds thereupon to the nuisance of the lights in the first house, the lessee of the first house shall have an action upon the case against such builder, for the first house was granted to him with all the easements and delights then belonging to it."

Note: That the facts of the case are not reported so that its exact nature is known; also, that the case put relates alone to *landlord's* right to erect upon contiguous ground buildings which shall operate to the nuisance of the lights in the lessee's house.

the right to light and air will pass by *implied grant* are neither very numerous or uniform.

As sustaining the doctrine, that a vendor of a house cannot afterwards, on his adjoining vacant land, make an erection which shall deprive such house of light, see *Story v. Odin*, 12 Mass. 157; *United States v. Appleton*, 1 Sumn. 492 (*arguendo* per STORY, J.); *Lamphin v. Mills*, 21 N. Y. 505 (*arguendo* per SELDEN, J.); *Gerber v. Grabel*, 16 Ill. 217 (*arguendo*).

Opposed to this doctrine, see *Myers v. Gemmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sandf. S. Ct. Rep. 316; *Parker v. Foote*, 19 Wend. 809 (*arguendo* per BRONSON, J.); *Haverstick v. Sipe*, 33 Pa. St. 368 (*arguendo* per LOWRIE, C. J.).

The grant of easements has been much discussed in the courts of England of late years, as will be seen by the following cases: *Pyer v. Carter*, 1 Hurlst. & Norm. (1 Exch.) 916, 1857 (as to drain); explained *Polden v. Bastard*, 116 Eng. C. L. 257 (use of pump); *Glave v. Harding*, 8 H. & N. 937; *White v. Bass*, 7 Hurlst. & Norm. 722, 1862 (as to light); *Curriers Co. v. Corbett*, 2 Dr. & Sm. 355; *Suffield v. Brown*, 10 Jur. N. S. 111; *Crossley v. Lightowler*, 3 Law Rep. Eq. 279, 1866; *Clark v. Clarke*, 1 Id. 16; Id. 442; *Martin v. Headon*, 2 Id. 425; *Dent v. Auction Manuf. Co.*, Id. 238; *Dodd v. Burchell*, 1 Hurlst. & Coltm. 113, 119; commenting on *Pyer v. Carter*, *supra*. And see, also, Judge REDFIELD's observations in Am. Law Reg., January 1865, pp. 134, 135.

After this glance at the state of the adjudications the question recurs, Is it a principle in our law, that if a man sells a house with windows and doors opening on to his vacant ground, he nor his grantee cannot afterwards build upon such vacant ground in such a manner as seriously to obstruct the flow of light and air to such house, without *express reservation* of the right to do so?

Did this question depend alone upon the authority of the English cases, it would have to be answered in the affirmative. It is, however, justly observed by Mr. Washburn, that the decisions as to *implied* easements of light and air are not uniform, nor in all cases satisfactory (Easements 497, pl. 17). If it be held, that there may be implied easements as to light and air—as this implication arises wholly from the condition and circumstances of the estates to which the easement relates, and as this condition and these circumstances are almost infinitely varied, it is easy to

perceive the difficulties which environ the practical application of the doctrine.

Perhaps the law as to implied easements generally cannot be said to be fully settled, and this is particularly true in this country as to easements of light and air.

The right to light and air seems to me to be, in many respects, different in its nature from easements relating to artificial erections on the servient estate, such as drains, gutters, pipes, &c., or rights of way and the like (see *Parker v. Foote*, 19 Wend. 309, per BRONSON, J.; *Dodd v. Burchell*, 1 Hurlst. & Coltm. 113, 119, per POLLOCK, C. B.; *Haverstick v. Sipe*, 33 Pa. St. R. 368, 371, per LOWRIE, C. J.).

As to light and air I am free to say, that I do not believe the rule as applied to our situation and circumstances a sound one, which holds that under any circumstances this right can by *implication* be burdened upon an adjoining estate, so as to prevent the owner thereof from building upon or improving it as he pleases. I would reverse the rule contended for by the plaintiff, and hold that he who claims that the ten, twenty, or thirty feet adjoining him (which in cities may be very valuable) shall remain vacant and unimproved, should found such claim upon an *express* grant or covenant.

This rule is simple. Grantor and grantee would both know that the deed is the measure of their rights. Is it any hardship upon the purchaser to secure by *express* grant rights so valuable to him and so detrimental to his grantor? Rights which unless limited, and defined by written stipulations, are of uncertain extent and of indefinite duration (see remarks of PATTESON, J., in *Blanchard v. Bridges*, 4 Ad. & Ellis 176).

Such a rule also harmonizes with, while the opposite rule contravenes, the purpose of our Registration Laws.

A denial of an easement by mere implication, as respects light and air, may in my judgment well be, without denying that other easements, of a different character, may and in some cases should be held to exist by implication.

But in the case at bar the court do not regard it as necessary more positively to deny the general doctrine contended for by plaintiff's counsel.

The doctrine of implied easements rests upon the supposed intention of the parties, as deduced from the situation and condi-

tion of the two estates to which the easement relates. An easement may be briefly defined to be a charge or burden upon one estate (the servient) for the benefit of another (the dominant).

In this case it would be a burden upon the estate retained by Robinson and afterwards sold to the defendant, for the advantage of the plaintiff's estate. This burden or servitude is, that this should remain vacant, if to improve it would materially obstruct the passage of light and air to the plaintiff's stores.

Now the circumstances surrounding this transaction make it quite clear that it was never intended that this easement should exist.

In discussing a similar question, Mr. Justice STORY well remarks: "That in the construction of grants, the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties:" *United States v. Appleton*, 1 Sumn. Rep. 492, 520; see also 2 Washb. Real Prop. 26; Broom's Legal Max. 261; Washb. on Easements 36, pl. 12; *Karmuller v. Krotz*, 18 Iowa 352; *Haverstick v. Sipe*, 33 Pa. St. Rep. 368, 371.

The first circumstance we refer to as evincing this intention, is the *language and character of the conveyances to the plaintiffs*. These conveyances contain express language as to several easements.

The right of way is an easement. And in the deeds to both plaintiffs that is expressly secured. The right to the use of the privy is an easement. And in both deeds it is stipulated for in terms. The right of Startsman to right of way on the east (two-and-a-half feet in width) was an easement, as was also his right to extend the second story of his building over it. Both of these were provided for in express words in his deed. And the same is true as respects the right of Morrison to the roof under the Downey contract with Robinson. This is also set down in his deed. Now these are all easements, and are carefully secured by the deeds. If the parties had contemplated any other easement, such as the important one to light and air, would it not also most likely have been secured by the deed?

The intention of the parties will be more manifest by other considerations.

We allude next to the *character and situation of the buildings purchased by the plaintiffs of Robinson.*

They both fronted on Washington street, which is 100 feet wide.

Morrison's store was built by Robinson, that is, the first and second stories were built by him, and the third story by Cook, S. & Downey in conjunction with him.

It was only fifty feet deep, and seventeen feet wide inside. The stories are about fourteen feet high. The front in the *first* story is an open one, composed of glass and iron—the windows being show windows ten feet high, with two sets of lights each. In the rear of the first story was one door and one window, beyond which extended the eleven feet embraced in defendant's original purchase, which was prior to Morrison's purchase. The rear cellar-window was very small, about eighteen inches or two feet square, with but two or three inches above the ground. There was a front cellar-window, and the outside entrance to the cellar was in front.

The *second* story had two large windows in front and one in the rear. When Morrison bought, the only access to the second story was by a stairway in the rear of the first story. The first and second stories had one room each, and were "finished off for one storeroom—counter and shelves below, and shelves above." Such was the condition when Morrison purchased.

Since then Morrison has entirely changed the interior arrangement. The stairway to second story has been removed; an entrance has been obtained to the second story from the west. The second story has been partitioned off into two rooms, and is used for offices—the rear window being relied on for light to the back office.

When Startzman purchased, there was upon it a one story frame house with an open front, and with an addition extending back to near the south line. In the rear there was but one small window of but six or eight panes of glass. This old building was removed and the present structure erected by Startzman, with an open front like Morrison's in the first story, and three windows in the front of the second story. In the rear of the first story there is a sash door and a large window.

It is proper to observe, that Robinson knew when he sold that

Startsman intended to replace the frame building with a new structure.

These circumstances have been mentioned for the purpose of showing that these buildings for the purposes for which they were erected, and in the condition in which they were sold, were not *essentially dependent upon the rear windows for light*: See Washb. on Easements 504, pl. 26, 502, pl. 20; *Blanchard v. Bridges*, 4 Ad. & Ellis 174; *Fifty Associates v. Tudor*, 6 Gray 255, approving *Back v. Stacy*, 2 Car. & P. 465; *Parker v. Smith*, 5 Id. 438; 7 Id. 377, 410; and recent English equity cases before cited, as to what amount of light a party is entitled to under an implied grant or prescriptive right.

If not thus dependent upon the rear openings for "such an amount of light and air as is reasonably necessary to the comfortable and useful occupation" of the building, the necessity for an implied grant does not exist, and the presumption that there was such a grant is very much weakened, if not entirely overthrown.

Surely such an easement, uncertain in its extent and duration, without any written or record evidence of its existence, fettering estates, and laying an embargo upon the hand of improvement which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts and not demanded by any consideration of public policy—surely such an easement should not be held to exist by mere implication when such implication originates in no reasonable necessity.

Mr. Washburn, assuming or taking for granted, that there may be an implied grant of such easements, observes that "the test seems to be whether what is claimed is reasonably necessary to the enjoyment of the part granted, and where that is not the case, it requires descriptive words of grant in the deed, to create an easement in favor of one part of a heritage over another:" Easements 61, pl. 42; 36, pl. 12; 504, pl. 26.

Again he says the implied easements (according to the tendency of the cases) will be held not to exist except in instances where if the grantor were to build on his vacant land, the owner of the house would be "virtually deprived" of the enjoyment thereof: Id. p. 502, pl. 20.

But there are other strong circumstances in the *situation of the property* against the existence of the supposed easement. Defend-

ant who now proposes to build, purchased his store before Morrison did, and at the same time purchased eleven feet in the rear. This eleven feet extended east beyond the rear window of Morrison. Robinson retained no rights in this eleven feet. Could not defendant at once have built upon this eleven feet, although it should obstruct the light to the store then owned by Robinson, but afterwards sold to the plaintiff, Morrison?

Plaintiff's counsel have seen the importance of this point, and argue that the defendant could not build on the eleven feet so as to darken the windows of the Morrison store, even though Robinson were yet the owner thereof. In their written argument they say: "The doctrine of *implied reservation* keeps almost equal pace with and is as fully recognised as that of *implied grant*. The rule is, that if a man have a house with lights, and sell the same, but retains the land adjoining, he may not build thereon to the damage of the lights in the house sold; so if he sells the land and retains the house, the purchaser may not build thereon to the damage of the lights of the house."

Such it seems to us cannot be the law. Such a doctrine as applicable to cities would be intolerable. The vendor sells the land, makes no reservation of any rights therein, parts with his dominion over it, receives his pay for it, and when his vendee proposes to build, he stays his hand with an *implied reservation*, and the vendee finds that he has made a barren, unprofitable purchase—that he owns and pays taxes upon a lot to afford the vendor an unobstructed supply of air and sunlight.

Lord HOLT denies such to be the law in *Tenant v. Goodwin*, 2 Ld. Raym. 1093, and his opinion was recently (A. D. 1862) approved by the Court of Exchequer in *White v. Bass*, 7 H. & N. 722 (denying doctrine of *implied reservation* of an easement for light). See also *Curriers Co. v. Corbett*, 2 Dr. & Sm. 355; *Suffield v. Brown*, 10 Jur. N. S. 111; *Crossley v. Lightowler*, 3 Law Rep. Eq. 279, 1866; Washb. Easements 32, pl. 11; Id. 494, pl. 10; *Johnson v. Jordan*, 2 Met. (Mass.) 234; *Haverstick v. Sipe*, 33 Pa. St. R. 368 (1859).

Therefore the defendant had the right to build and darken the rear window of what is now the Morrison store, and Robinson could not resist it. His right thus to build was not affected by the subsequent sale of the store by Robinson to Morrison. This being so there was no implied grant in the sale to Morrison from

Robinson that the windows should remain unobstructed by buildings in the rear.

The store of Startzman was not then erected. Although Robinson knew he intended to build, there is no evidence that he knew such building when erected would *essentially or reasonably need* light and air from the rear, and hence it seems difficult to say that there was an implied grant of such an easement. This consideration, alone, it seems to us, is conclusive against the claim of Startzman.

Another and quite important circumstance against the implied easement of light and air over the entire vacant ground owned by Robinson at the time of the sales to the plaintiffs is *the express grant of a four feet right of way*. This has before been alluded to in respect to other questions in the case.

In all the cases we have examined in which an implied grant of light and air has been recognised the house sold and the land to which the easement has been attached were *adjoining*. See *Palmer v. Fletcher*; *Cox v. Mathews*; *Roswell v. Pryor*; and other cases before referred to and stated.

We have found no case, although we have directed particular attention to the point, in which an implied grant of light and air has been holden to exist where the vendor at the time of the sale of the first parcel laid out a space or passage between it and the portion of the heritage or estate retained by him.

The servient tenement is thus disconnected from the dominant.

It is argued by plaintiffs' counsel that this is simply a way,—and has no reference to light and air. So is a street or an alley a way—but it is also an open space which admits the flow of light and air. The object of this way in the present case was to secure a passage to the privy, also an outlet through the right of way on the east, and probably a right of way to the contemplated ten foot alley; and also to secure the plaintiffs' estates against the erection of buildings nearer than the four feet.

If the *aliunde* testimony is competent to show the purposes for which the private way was laid out by Robinson, it shows that these were the purposes.

Without positively deciding that there may not, under any circumstances, be an implied easement of light and air, we hold that the circumstances before enumerated negative any such implication or easement in the case under consideration.

III. *As to the removal and destruction of the privy.*—The next and only remaining question relates to the plaintiffs' rights in respect to the privy.

This was situate on land owned by Robinson at the time he sold to the plaintiffs, and it adjoined the private way in the rear of their stores. The plaintiffs' deeds in express terms granted to them "*the right to the use of the privy.*"

This right was embraced in the consideration paid for the property. It was not revocable at the will of Robinson or his grantee. It would exist as long at least as the privy should stand and have a right to stand.

Defendant purchased the land upon which it was situate and removed it at night without the consent of the plaintiffs.

He justifies this act upon two grounds:—

1st. He claims that the vault was full and hence the easement was at an end.

2d. If this is not so, he claims the structure had become a nuisance, and therefore he had a right to abate it, and he abated it by removing it.

The first ground is not supported by the evidence. The vault was not entirely filled, and if it were, we think plaintiffs might, if they saw proper, remove the contents and thus continue the right to the use of the structure. The point is made that it was Robinson's duty to keep it in order, and that the defendant by his purchase takes Robinson's place.

But the deed is silent upon this point, and it is not essential to determine upon whom the duty of keeping it in order would rest. (See Washb. Easements, ch. 6, § 1, p. 564.) Nor do we think the defendant was justified in removing it with strong hand and against the plaintiffs' wishes on the ground that it was a nuisance.

A party may with his own hand abate that which is to him a nuisance. But such abatement does not consist in the destruction of the property unless such destruction be absolutely necessary. It is the offensive use of it that he is justified in abating: *Barclay v. Commonwealth*, 25 Pa. St. R. 503; 2 Hilliard Torts 95.

Plaintiffs asked to try disinfectants. Defendant refused, claimed the right to remove it, and did remove it the same night.

The right to the use of this out-house was property, and the

plaintiffs' rights could not be thus summarily determined by the defendant.

Defendant claims that the plaintiffs' right to use the privy ended when Robinson conveyed to him; that the grant of the use is not a covenant running with the land.

The plaintiffs' rights were in the nature of a burden upon the estate on which the privy stood. The conveyance to the defendant of the estate did not disburden it of this servitude; particularly is this so, as the deed to the defendant is expressly made subject to the plaintiffs' rights.

Again, the defendant claims "that whether it was removed legally or illegally, the destruction of the privy extinguished the easement."

If *plaintiffs*, as the owners of the dominant heritage, had destroyed it, this might well be held to extinguish the easement. But not when such destruction is by the party owning the estate which owes the servitude. The law holds out no such bonus for the commission of torts. Nor does it allow a party to gain and base a right upon an illegal act.

Again, it is contended that being destroyed, the only remedy of the plaintiffs is an action for damages, as the court has no power to restore the privy.

But it has the power to order the defendant to restore it, or to allow this to be done by the plaintiffs at his expense.

As respects the privy we think the plaintiffs have a right under the circumstances above stated, to be put *in statu quo*.

The cause will be remanded with directions to the court below to dismiss the plaintiffs' bill except as to the rights in relation to the privy; to enter a decree that defendant shall restore this, or, in default thereof, that plaintiffs may do so, and the expense or so much thereof as may be equitable to be charged to the defendant.

The decree will also enjoin the defendant from erecting his proposed building so as to interfere with the site of the privy.

Plaintiffs may, if they elect, claim damages and waive the right to a restoration of the privy. All rights in relation to the supposed ten feet alley on the east of the premises to remain open, not being embraced in this adjudication.

Reversed.

Court of Appeals of New York.

THE IRVING BANK v. JAMES WETHERALD AND OTHERS.

A promissory note being presented by one bank at another bank where it was made payable, was certified to be good and was then stamped "paid" by the presenting bank, but on the same day the maker's want of funds being discovered, notice was given to the presenting bank, which however declined to cancel the certificate. The certifying bank then paid the amount, took the note and re-presented it at its own counter, had it duly protested and notified the indorsers. *Held*, that the facts did not amount to payment of the note and the bank was entitled to recover from the indorsers.

Per HUNT, J.—The certifying bank having given notice of its mistake to the presenting bank before the latter had done or omitted any act by which its rights were impaired, the certifying bank was released from liability on its erroneous certificate, and need not have paid the amount of the note.

THE questions in this case arise upon the following facts, which are found by the judge who tried the cause, without a jury:—

On the 7th day of December 1858, one Morris Wilson made his note for \$304.30, at eight months, payable at the Irving Bank, to his own order; he indorsed the same, and it was also indorsed by Wetherald & Young, the defendants. Said note, before maturity, was duly discounted by the Seventh Ward Bank for the defendants. On the day the aforesaid note matured the Seventh Ward Bank, as the owner thereof, presented it to the paying teller of the Irving Bank, who certified it in the usual manner as good, and charged the same to Morris Wilson, in the books of the Irving Bank. At this time Morris Wilson had no funds in the bank. Immediately upon said note being returned to the Seventh Ward Bank, certified, that bank caused the same to be stamped "paid." Upon the discovery by the officers of the Irving Bank of the mistake of their paying teller, in certifying said note, and before 3 o'clock of the same day, the said Irving Bank notified the said Seventh Ward Bank of the mistake, and requested the said certificate to be cancelled, which the said Seventh Ward Bank refused. Upon the refusal of said Seventh Ward Bank to cancel said certificate, *the said Irving Bank paid to said Seventh Ward Bank the full amount of said note, and received the same into their possession, stamped "paid," as aforesaid*; and thereupon, on the same day of its maturity, and before 3 o'clock, P. M., the same was again presented at the counter of the Irving Bank, for payment, payment demanded,

and the same duly protested for non-payment, and notice thereof given to the defendants.

The court directed judgment in favor of the defendants. The General Term of the First District reversed this judgment, and ordered a new trial. The defendants appeal to this court, stipulating that if the order granting a new trial be affirmed, judgment absolute may be entered against them.

Tyler, for appellant.

E. Fitch, for respondent.

HUNT, J.—Both the judge at the Circuit and the General Term, are of the opinion that the notice by the plaintiffs to the Seventh Ward Bank, of the mistake in certifying Wilson's check to be good, before any steps had been taken, or any measures omitted by the Seventh Ward Bank, and while there was still time to fix all the parties upon the note, relieved the plaintiffs from their liability on the certificate. In this opinion I concur. Such a certificate possessed no extraordinary or hidden power. It should impose no greater liability than its terms fairly require.

Divested of all technical terms, the transaction in question was simply this: The Seventh Ward Bank present for payment, at the Irving Bank, where it was made payable, the note of Morris Wilson. The making the note payable there, was a warrant from the maker to the latter bank, to pay it from his funds, and charge it to him. When the note is presented, the teller of the paying bank informs the presenter that the note is good; in other words, that the maker has the funds in the bank to meet it. This information may be communicated verbally, by letter, or by a memorandum on the note, ordinarily called a certificate. If the note were presented by an individual, the money would ordinarily be paid to him, in satisfaction, and the note left with the paying bank. In the case of a bank, the note is taken back by the party owning it, to be returned the next day in the settlement of exchanges, as an item of credit in its favor and against the certifying bank. This is the usual course of business in the city of New York. The correctness of this certificate is a matter which the certifying bank has the means of knowing, and it is bound to state correctly. If the presenting bank relies upon its accuracy, and fails to charge the indorsers, as upon non-payment on pre-

sentation, the certifying bank is estopped from denying the truth of its statement. Having asserted of its own knowledge that the maker had funds in its bank to meet the note, and the presenting bank having omitted to charge its indorsers in reliance upon such statement, the certifying bank will not be permitted to go behind its own statements. The teller of the bank is the proper officer to make this statement, and his statement binds the bank, whether accurate or erroneous. These principles were established in *Meads v. The Merchants' Bank of Albany*, 25 N. Y. 148, and in *Farmers' and Mechanics' Bank of Kent County v. Butchers' and Drovers' Bank*, 16 N. Y. 125. In the present case, the Irving Bank discovered its error in stating that it had funds for the payment of Wilson's note, in sufficient time to prevent any loss in consequence of the error. It immediately notified the Seventh Ward Bank of the error, and in time to enable it to make a re-presentment, if necessary, and to charge the indorsers. No damage, therefore, could accrue to the latter bank from the erroneous information. They were bound to accept and to act upon the corrected information, if there were time and opportunity to do so. I agree with the court below that the plaintiffs might have stopped at that point, and there would have been no liability on their part to the Seventh Ward Bank. That bank went farther, however, and upon the refusal of the Seventh Ward Bank to cancel their certificate, paid to that bank the amount of the note, re-presented it at their own counter, and gave notice of non-payment to the defendants as indorsers thereof. This the judge at Special Term held to amount in law to a payment of the note. The General Term held otherwise, and reversed his judgment. It was agreed by the judge at Special Term, that the certificate of the paying teller was not payment of the note. In this he was no doubt correct. It has also been held, and correctly, that the stamping a note as "paid," or marking it with a cancelling hammer, does not constitute a payment: *Scott v. Betts*, Lalor's Sup. to H. & D. 363, and note; *Watervliet Bank v. White*, 1 Denio 608.

That the advance of the amount of the note by the plaintiffs to the Seventh Ward Bank was made to relieve them from an apprehended liability on their certificate, and was not intended by them to be in discharge of the note, is obvious from the immediate re-presentment of the note for payment, and notice to the indorsers

that the same had not been paid. There could have been no other purpose in this than to charge the parties to an existing note. So, if they had intended a payment and discharge of the note, they would have allowed its return in the exchanges of the day following, in the usual course of business, instead of making a special payment of the same. The judge has not found as a fact that the note was intended to be paid by the Irving Bank, or that it was paid by them. He could not have so found upon the testimony with propriety. He simply finds that the plaintiffs paid "the amount of the note" to the Seventh Ward Bank, and he holds as a legal result that the advance of the money, under the circumstances stated, operated to discharge and cancel the note. In this conclusion I think he erred. The plaintiffs took the note as a purchaser, and acquired the rights of a holder. See *Watervliet Bank v. White*, 1 Denio 608. In that case the Watervliet Bank, at whose counter the note was made payable, received it from the holder for collection, and having an account with the maker which, however, was not good for the amount, charged it to him and paid it to the holder, at the same time placing upon it a cancelling mark. By the practice of the bank this mark only denoted that the note was charged. In a suit on the note by the bank, as indorser against the maker, it was held that the bank held it with the rights of a purchaser, and could maintain the action.

In the present case the plaintiffs feared a liability to the Seventh Ward Bank, by reason of their mistaken certificate of the goodness of the note. They advanced to that bank its amount for the purpose of representing it for payment, notifying the indorsers, and holding it as an existing security. The defendants are indorsers duly charged. They received themselves the amount of the note upon its discount. It has never been paid, and is now an available security in the hands of the plaintiffs.

The order of the general term should be affirmed, and judgment absolute ordered in favor of the plaintiffs for the amount of the note and interest.

Supreme Court of Pennsylvania.

RICHARDS v. PHŒNIX IRON CO.

Where a particular kind of fuel, the use of which is productive of injury to the owners of neighboring property, is necessary in the course of a manufacture in which the parties using it are largely engaged, and whose products the public require; and the process of manufacture and fuel used are generally employed in similar establishments, and there is neither a wilful or negligent infliction of injury, equity will not enjoin against the use of such fuel; but will leave the party complaining to his action at law for damages.

Semble, that if the use of such fuel in the particular manufacture were unnecessary, and other fuel was equally good and available, or that by a reasonable expenditure of money in the manufacturing works all injury might be avoided, equity would enjoin against it as a nuisance, where injury was inflicted upon neighboring property.

APPEAL from the Common Pleas of *Chester county*.

This was a bill in equity filed by the owner of a dwelling-house and cotton factory in Phœnixville, to restrain the defendants engaged in the manufacture of iron from using bituminous or semi-bituminous coal in their furnaces, which it was alleged rendered plaintiff's dwelling-house uncomfortable and unwholesome, and injured his factory by discoloring his fabrics and deteriorating his machinery.

The court below refused the injunction prayed for; whereupon the plaintiff appealed.

The facts of the case sufficiently appear in the opinion of the court.

W. M. Meredith, Darlington & Meredith, for appellant.—Plaintiff has a right to pure air; as much as a proprietor on a stream has a right to receive the water of the stream uncorrupted by the proprietors above him: *Howell v. McCoy*, 3 Rawle 269; *Aldred's Case*, 9 Rep. 58; *Morley v. Pragnell*, Cro. Car. 510; *Rex v. White & Ward*, 1 Burr. 333; *Rex v. Neill*, 12 E. C. L. R. 226; *Rhodes v. Dunbar*, per READ, J., at Nisi Prius, Pitts. Leg. Jour. N. S. 590; 3 Bl. Com. 217; 2 Show. 327.

See also the following cases of nuisance:—*Walter v. Selfe*, 4 De G. & S. 315; *Pollock v. Lester*, 11 Hare 266; *Soltau v. De Held*, 2 Simmons N. S. 133; *Hole v. Barlow*, 4 C. B. N. S. 334, has been overruled and severely dealt with; *Bamford v.*

Turnley, 9 Jurist N. S. 377. See also *St. Helen's Smelting Co. v. Tipping*, 5 Am. Law Reg. N. S. 104.

If this is a public nuisance, no lapse of time can save it: *Commonwealth v. Alburger*, 1 Whart. 469. If it is a private nuisance, defendants must prove prescription by a continued, uninterrupted, and adverse enjoyment of the easement for twenty-one years: *Howell v. McCoy*, 3 Rawle 269; *Hoy v. Sterrett*, 2 Watts 330; *Dyer v. Depuy*, 5 Whart. 595; *Bliss v. Hall*, 4 Bing. N. C. 183. Until then every continuance is a fresh nuisance: *Roswell v. Prior*, 12 Mod. 638; 3 Bl. Com. 220.

Appellant's counsel also cited *Luttrell's Case*, 4 Rep. 87; *Flight v. Thomas*, 10 A. & E. 590; *Commonwealth v. Van Sickle*, Brightly's Rep. 69; *Respublica v. Caldwell*, 1 Dallas 150; *Pottstown Gas Co. v. Murphy*, 3 Wright 257; *Attorney-General ex rel. v. Council of Birmingham*, 4 K. & J. 528; *Spokes v. Banbury Board of Health*, 1 Law Rep. Eq. Cas. 42; *Goldsmid v. Tunbridge Wells Commissioners*, Id. 161.

Defendants cannot be justified on the ground of custom: *Henry v. Risk*, 1 Dallas 265; *Stoever v. Whitman*, 6 Binn. 417; *Bolton v. Colder*, 1 Watts 360; *Rapp v. Palmer*, 3 Id. 179; *Cox v. Heisley*, 7 Harris 243; *Commonwealth v. Passmore*, 1 S. & R. 217; *Vaughan v. Holdes*, Cro. Jac. 80. Such custom, if proved, would be unreasonable; there is no such thing as a legal custom to commit a tort.

As to its being inconvenient to defendants to abate the nuisance complained of: *Commonwealth v. Erie and North East Railroad Co.*, 3 Casey 376.

As to the right of the plaintiff to relief when special damage to him is shown, whether the nuisance complained of be considered a public or private nuisance: *Hughes v. Heiser*, 1 Binn. 463; *Pittsburgh v. Scott*, 1 Barr 319; *Rhodes v. Dunbar*, *supra*; *Sparhawk v. Railway Co.*, 4 P. F. Smith 401.

In regard to issuing an injunction without a trial at law, see *Dennis v. Eckhardt*, 3 Grant's Cases 390; *Sheetz's Appeal*, 11 Casey 88; *Rhodes v. Dunbar*; *Sparhawk v. Railway Co.*, 4 P. F. Smith 401.

R. C. McMurtrie, for appellees.—There is at most an annoyance, and that occasional. It is not deleterious to health. The

prohibition to emit smoke will cause a stoppage of plaintiff's works.

The remedy sought is not of right: *Duke of Bedford v. Trustees of British Museum*, 2 Mylne & K. 552; *Saunders v. Smith*, 3 Mylne & Craig 711, 728; *Ripon v. Herbert*, 3 Mylne & K. 119; *Attorney-General v. Nichol*, 16 Vesey 342; *Hilton v. Greenville*, Cr. & Phil. 292; *Robeson v. Pittinger*, 1 Green Ch. R. 64; *Winfield v. Crenshaw*, 4 Hen. & Munf. 474; *Rorer v. Randolph*, 7 Porter 247; *Dana v. Valentine*, 5 Metc. 8; *Eason v. Perkins*, 2 Dev. Eq. 40; *Barnes v. Calhoun*, 2 Iredell Ch. 201; *Bradshaw v. Lea*, 3 Id. 305; *Roberts v. Anderson*, 3 Johns. Ch. Rep. 202; *Smith v. Adams*, 6 Paige Ch. Rep. 435; *Hamilton v. Railroad*, 9 Id. 171; *Van Bergen v. Van Bergen*, 3 Johns. Ch. Rep. 287.

It is discretionary, and the court will take all the circumstances into consideration, and weigh the evils to both sides, and to the public at large: *Fishmongers v. E. I. Co.*, 1 Dickens 163; *Hilton v. Greenville*; *Ripon v. Hobart*; *Attorney-General v. Nichol*; *Rover v. Randolph*; *Dana v. Valentine*; *Eason v. Perkins*; *Barnes v. Calhoun*; *Bradshaw v. Lea*, cited above; *Crowder v. Tinkler*, 19 Vesey 622.

Unless plaintiff can establish by a verdict that defendant's trade amounts to such an annoyance as to be a nuisance, equity will not restrain a useful trade notoriously carried on without objection even in closely built cities: *Attorney-General v. Cleaver*, 18 Vesey 211, 217, 220; *Fishmongers v. E. I. Co.*; *Crowder v. Tinkler*, cited above; *Squire v. Campbell*, 1 Mylne & Cr. 459.

The opinion of the court was delivered at Philadelphia, February 3d 1868, by

THOMPSON, C. J.—The complainant in this case is the owner of a dwelling-house and cotton-factory in the village of Phoenixville, Chester county; and the respondents are the owners of very extensive iron-works in the same village.

The former complains that by reason of the kind of fuel used by the latter in these works his residence is rendered uncomfortable and unwholesome; and his factory materially injured in the discoloration of his fabrics and deterioration of his machinery, Claiming that he had established this, he asked the court below for a perpetual injunction to restrain the respondents from using

the fuel—bituminous and semi-bituminous coal—complained of as the cause of the injury to his property, in their furnaces. The case was heard on bill and answer, and the court decided against him. He was then permitted to file a replication and take testimony, on which there is a report of a master, also against him.

The court having sustained the report, again refused to enjoin the defendants, and the case is before us on an appeal, and we are asked to do what the court below refused, namely, to perpetually restrain the defendants from using bituminous or semi-bituminous coal in their furnaces.

The defendant's works are very extensive; amongst the most so, it is said, of any of the kind in the Commonwealth, consisting of several blast furnaces, some seventy puddling furnaces and rolling-mills, and other machinery. They began on a small scale some forty-nine or fifty years ago, and up to 1840 used bituminous coal exclusively. The original works were not precisely on the spot of those complained of, but so near it as to entitle the latter to be regarded as an extension of the former. The extensions made in these works in 1837-46 and 1853, constitute the present works, the cost of which alone is represented as exceeding half a million of dollars, and which, at the time of taking the testimony, and previously, employed, as the master reports, from eight hundred to a thousand hands.

The plaintiff's dwelling, it appears, is situate on a bluff or hill northwardly from the defendant's works, about seventy feet above the nearest furnace-floor, which brings its lower story about on a level with the tops of the puddling-stacks, and when the wind is towards the plaintiff's house, and from the furnaces, the consequence is, that it is at times enveloped in coal-smoke, thrown out of the chimneys of the puddling furnaces.

It cannot be doubted, I think, that this materially operates to injure the dwelling-house as a dwelling, and consequently deteriorates its value.

The alleged injury to the factory is, mainly, that the smoke and soot of these furnaces blacken the stock, and render their fabrics less saleable. This I can readily understand and believe.

The house was erected in 1829 and the factory in 1830, and both have been generally occupied ever since—the factory not doing full work for some time past, as the master reports.

A careful consideration of the testimony satisfies us that the

use of semi-bituminous coal—the fuel complained of—is necessary to the successful manufacture of iron fit for axles, cannon, and the like, and in the manufacture of which the defendants are largely engaged; that the process of manufacture and fuel used are generally employed in similar establishments; and that there was neither a negligent nor wilful infliction of injury upon the plaintiff or his property, in the defendants' mode of operating the works. Whatever injury may have, or shall result to his property from the defendants' works, by reason of the nuisances complained of, is such only as is incident to a lawful business, conducted in the ordinary way, and by no unusual means. Still there may be injury to the plaintiff; but this of itself may not entitle him to the remedy he seeks. It may not, if ever so clearly established, be a case in which equity ought to enjoin the defendants in the use of a material necessary to the successful production of an article of such prime necessity as good iron—especially if it be very certain that a greater injury would ensue by enjoining them than would result from a refusal to enjoin. If we were able with certainty to say that the use of semi-bituminous coal in the process of making good iron by the puddling process was unnecessary, and other fuel was equally good and available; or, that by a reasonable expenditure of money in the works, all injury might be avoided, a different case might appear to our minds as chancellors, and we might well say, that the cause of injury should cease, and that a decree on terms to meet such a contingency should be made, so as to prevent the injury. But we have not this case before us. Bituminous, or at least semi-bituminous, coal, we think, is necessary in the manufacture of iron such as the business of the defendants requires, and whose fabrics the public requires.

Nor are we shown by testimony or reliable tests of any kind, that the smoke produced in the puddling process can be consumed, as it undoubtedly may be in ordinary chimneys, or where produced in furnaces used to propel machinery. I am personally cognisant that this may be done, from observation both in this country and England; and I have, therefore, read with satisfaction, and entire conviction of its truth the article, from the *London Quarterly* for 1866, so largely quoted by the learned counsel of the appellants; but I would be very unwilling to act on that conviction or that theory, any further than to the extent

to which experiment has gone. I would require very clear proof of the practicability of the application of the principle to cases dissimilar, or partially so, as puddling-chimneys from common steam smoke-stacks. The defendants seem willing to test the applicability of smoke-consumers to puddling furnaces; and at the same time express their doubts in a practical shape, by offering \$50,000 for an invention which will consume the smoke of these puddling-stacks, without impairing the efficiency of the process of manufacturing iron. However this may be, certain it is, we are not able to say from anything shown, that the evil complained of can be remedied by the application of smoke-consumers. We do not know what effect their application might have on the process. Nor do we think we should enjoin the defendants because they might be unwilling to add to the height of their chimneys, without knowing what effect this would have, or because they might not be willing to tear down their establishment and re-erect it on Seiman's plan or patent. What effect these remedies or either of them ought to have on the mind of a chancellor, if practicable, if the injury complained of were absolutely irreparable, we are not called upon to say, for such is evidently not the case here, if there be damage, as we shall presently show.

The rule on this subject is well stated in *Gray v. The Ohio and Pennsylvania Railroad Co.*, 1 Grant's Cases, thus:—"Where damages will compensate either the benefits derived or loss suffered from a nuisance, equity will not interfere." See, also, Hilliard on Injunction 271; Adams' Eq. 485; Fonblanque's Eq. 51; Story's Eq., § 925, *et seq.*; Eden on Injunct. 269.

In *Coe v. Lake*, 37 N. H. 254, it was said where the bill prayed an injunction to suppress a nuisance to the plaintiff's land it might be dismissed on general demurrer for want of equity, unless it appeared from the subject-matter affected by the alleged nuisance that there was danger of irreparable mischief, or of an injury, such as could not be adequately compensated in a suit at law. These and many other authorities to the same effect, some of which are on the paper-book of the appellees, prove conclusively that, as a general rule, mischief or damage is not irreparable which is susceptible of being compensated in damages. We have no doubt that an action at law will lie for an injury to property for causes similar to those mentioned in the bill, and if so, why will not the remedy be adequate in such case, and thus the

injury be repaired in damages? We are not to presume that it will not be. This would be to impugn the justice of our common-law forums without a reason. We think under the circumstances of the case that the injunction ought to be refused, and the plaintiff left to his action at law for the recovery of such damages as he may have sustained, or may sustain.

An error seems somewhat prevalent in portions, at least, of this Commonwealth, in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side, and consequent injury on the other, a decree to restrain the act complained of as certainly follows as a judgment would follow a verdict in a common-law court. This is a mistake. It is elementary law, that in equity a decree is never of right, as a judgment at law is, but of grace. Hence the chancellor will consider whether he would not do a greater injury by enjoining, than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should so appear he will refuse to enjoin: *Hilton v. Greenville*, 1 Cr. & Ph. Ch. R. 292; *Gray v. The Ohio and Pennsylvania Railroad Co.*, 1 Grant 412.

We think this is a safe rule, and that the case we are considering is within it. With these views, and on full consideration of all the testimony in the case, we are of opinion the injunction was properly refused in the court below; and that the decree dismissing the plaintiff's bill, with costs, must be affirmed.

Appeal dismissed at the costs of the appellant.

Supreme Court of Pennsylvania.

COMMONWEALTH EX REL. BALLIER v. THE COMMON COUNCIL
OF THE CITY OF PHILADELPHIA.

A tribunal authorized by law to decide upon the sufficiency of sureties for official duty, cannot postpone its decision because the title to the office is elsewhere disputed.

An officer not commissioned is authorized to enter upon the performance of the duties upon the certificate of election delivered by the return judges.

THIS was a proceeding for a *mandamus*, to compel the Common

Council of the city of Philadelphia to decide upon the sufficiency of sureties submitted to them by the relator.

At the general election of October 1867, John F. Ballier was returned as elected to the office of city commissioner. This office was created by § 13, Act of February 2d 1854, Pamph. L. 30. Before entering upon the performance of the duties of said office it was required that he should give bond "with such sureties as shall be approved by the councils for the faithful performance of the duties of said office:" § 4, Act of April 21st 1858, Pamph. L. 386.

The relator submitted sufficient sureties to the Common Council, but that body declined to act.

On the 5th day of February 1868, a petition was filed in the Supreme Court of Pennsylvania, on which an *alternative mandamus* was awarded as follows:—

January 1868. 367.

City and County of Philadelphia. ss.

The Commonwealth of Pennsylvania,

To George W. Mactague *et al.*, members of the Common Council of Philadelphia,
Greeting :

Whereas, John F. Ballier has filed his petition, setting forth

That at the general election in October 1867, the said John F. Ballier was duly elected by the qualified voters of the city of Philadelphia to the office of city commissioner, for a term commencing on the 1st day of January next succeeding said election, as appears by the return thereof, filed in the office of the prothonotary of the Court of Common Pleas of the county of Philadelphia, and a certificate of which election was delivered to the said John F. Ballier in accordance with law :

And that, by the fourth section of an Act of the General Assembly, approved April 21st 1858 (P. L. 386), it is enacted that a city commissioner shall, before entering upon the duties of his office, give bond in such amount and with such sureties as shall be approved by the councils of Philadelphia, for the faithful performance of the duties of said office :

And that, in pursuance to said act, the councils of Philadelphia, by an ordinance of May 10th 1858 (p. 200), ordained that the amount of the bond to be given in such case should be in the sum of \$10,000 :

And that, in pursuance to the requirements of the law as aforesaid, the said John F. Ballier submitted to the Common Council certain sureties, whose sufficiency was approved by the committee of finance in accordance with the rules of said body, but that the said Common Council refuse to consider the same, or to proceed to decide thereupon ; and that said action caused injury to the said John F. Ballier, and that he was without any specific remedy in the premises, and praying that a writ of *mandamus* should issue :

Therefore, we COMMAND you and each of you, as members of the Common Council of the city of Philadelphia, to decide according to law, and the usages of said council, at a session of your body next hereafter occurring, upon the sufficiency of the sureties of the said John F. Ballier, submitted by him for the faithful per-

formance of the duties of the office of city commissioner ; or the cause wherefore to show unto us, why you should not, in answer to this writ, on Saturday, the 15th day of February 1868, and hereof fail not.

The respondents filed a return setting forth " that by a petition of fifty citizens and qualified electors filed in the Common Pleas of the county of Philadelphia on the 18th day of October 1867, in accordance with § 35 of the Act of February 2d 1854, Pamph. L. 28, complaint was made of ' a false return and undue election for the office of city commissioner,' and that the proceeding upon said petition was still pending, and that this was a sufficient excuse for a non-compliance with said writ.

To this return the relator demurred and prayed that a *peremptory mandamus* issue.

David W. Sellers and *Isaac Gerhart*, for the relator, urged that it was the duty of the defendants to proceed with the decision of the sufficiency of the sureties: *Lamb v. Lynd*, 8 Wright 336.

Where an officer is elected by the people, the summing up and certificate of the return judges determine in the first instance the title to the office. If error or fraud is alleged a judicial tribunal must determine that question in the usual way, but meanwhile the duties of the office must be performed, and by the holder of the *prima facie* title: *Ewing v. Thompson*, 7 Wright 373.

If securities must be approved by the court, the court cannot suspend its action although at the very time the contest for the office may be progressing before it: *In re Securities*, 4 Phila. Rep. 370. *A fortiori* is the duty to be performed by a municipal body having no power to decide upon the title to the office.

James Lynd, City Solicitor, *contra*.

February 21st 1868.

PER CURIAM.—Until the title of the relator is avoided it is good against all. He is authorized to enter upon the performance of the duties of the office, and the Common Council cannot delay him, by declining to approve his sureties, if sufficient. A pending contest is nothing to this question. Let a *peremptory mandamus* issue as prayed for.

*United States District Court, District of Massachusetts.*UNITED STATES v. THIRTY-THREE BARRELS OF DISTILLED SPIRITS ET AL.¹

The words "personal property" in the 48th section of the Internal Revenue Act of 1864, as amended by the Act of 1866, do not include all the personal property found in the same building where the still and illicitly-distilled spirits were found, and in the possession, custody, and control of the same person who had control thereof, but must be confined to the tools, implements, and instruments that had been or could be used in connection with the distillation of spirits in the building.

THIS was an information against the contents of a four-story building on Central Wharf, in the city of Boston. There was a still in the attic of the building, a grocery store on the first floor, where liquors were sold at retail, and on the second and third floors there were barrels, chemicals, and other articles, such as might be used in the manufacture of spirits. The contents of the grocery store, excepting certain barrels of liquors, were claimed by John Lombard. At the trial before a jury, the government contended that the whole was one establishment, and that the grocery store was used only for purposes of concealment in carrying on the illicit distillation in the attic, and that the whole was forfeited to the United States. The jury condemned the whole property. A motion for a new trial and a motion for an arrest of judgment were made by the claimant.

W. A. Field, for the United States.

L. S. Dabney, for claimants.

LOWELL, J.—In this case there is a motion for a new trial on the ground that the verdict is against the weight of the evidence, and a motion in arrest of judgment. The information, as amended, alleges in the 5th count that certain distilled spirits were found at No. 45 Central Wharf, Boston, in the possession, custody, and control of one John Lombard, for the purpose of being sold by him in fraud of the revenue laws; that two hogsheads of molasses were found at the same place in the possession of said Lombard, and were raw materials which he intended to

¹ We are indebted for this case to the "Internal Revenue Record."—ED. AM. LAW REG.

manufacture into distilled spirits, for the purpose of fraudulently selling the same, and evading the taxes thereon, and that the other goods, wares, merchandise, and property seized, which appear to form the stock, furniture, and fixtures of a retail dealer in liquors and groceries, were tools, implements, instruments, and personal property found at the same time and in the same building with the spirits and the molasses, and in the possession, custody, and control of the said Lombard.

The other amended counts differ from the 5th count, in substance, only as to the person in whom the custody is alleged to be.

The law under which the information is brought is § 48 of the Act of 1864, ch. 173, 13 Stat. 240, as amended by the Act of 1866, ch. 184, 14 Stat. 111. As the act stood at first, all goods, &c., on which duties are imposed which shall be found in the possession, &c., of any person for the purpose of being sold or removed in fraud of the internal revenue laws, may be seized and shall be forfeited, and so of raw materials intended to be manufactured for the purpose of being so sold, and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles are found, *and intended to be used by them (i. e., the persons before mentioned), in the manufacture of such raw materials.* The new statute amends the phraseology of this section in several other particulars, without perhaps much variation of the meaning, but omits altogether the qualifications of intended use of the tools, implements, instruments, and personal property, and upon a literal interpretation might seem to subject to seizure and forfeiture all goods and chattels and other things coming within the very general description of personal property, to whomsoever it may belong, if found in the same building, including out-buildings, yard, &c., with the offending goods.

It is impossible to believe that any such sweeping condemnation is intended to be passed, founded upon mere proximity in place, upon the goods of all persons innocent and guilty. In its application to a city or other busy place, where the same building is divided into numerous tenements, shops, offices, counting-houses, and warerooms, all being often found under one roof, and each occupied by a different tenant, the operation of such a law would work the most enormous and unheard-of injustice. To take a

single example, the money in the vaults of any bank might be forfeited for the fault of some petty trader in the attic of the banking-house. It is a general principle of law as well as of natural justice, that statutes will not be understood to forfeit property except for the fault of the owner or his agents, general or special, unless such a construction is unavoidable. See *Peisch v. Ware*, 4 Cranch 847; *Freeman v. 403 Casks Gunpowder*, Thacher Crim. Cases 14.

This information does indeed allege that the personal property sought to be confiscated was in the possession or under the control of the wrongdoer. But even if the statute be limited in that way, it will be most arbitrary and unjust in its operation, for the punishment will bear no sort of necessary relation to the offence. The crime is punished by the very same section with a fine of \$5000, or double the amount of the tax; but this forfeiture may be indefinitely greater than either. But the more valid reason against this construction is, that nothing in the statute itself points to the possession or control of this personal property as deciding its status, but only and solely the place where it is found. A forfeiture of the goods of the same owner, found with the unlawful goods, is not without precedent in revenue laws, and I was at first disposed to believe that such was the meaning of this statute, but upon a more careful inquiry, I am satisfied that the construction presently to be mentioned, is more consistent with the words of the law. By reason and analogy, as well as by the context, we find that some real connection with the fraud is intended to be attached to the property that is liable to seizure. The untaxed articles and the raw materials intended to be manufactured, are the principal things, and the tools, implements, instruments, and personal property, are only the connected incidents. I am of opinion that by the familiar rule of construction, sometimes cited *noscitur a sociis*, we must restrict the general words personal property, by the more particular and immediately preceding words, tools, implements, and instruments. Such a restriction has been adopted in many well-considered cases. Thus, where it was enacted that no tradesman, artificer, workman, laborer, or other person whatsoever, should do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, the Court of King's Bench held unanimously that this did not include drivers of stage-coaches: *Sandiman v. Breach*, 7 B. & C. 96.

So any artificer, calico printer, handicraftsman, miner, collier, pitman, keelman, glassman, potter, laborer, or other person who shall contract with any person whomsoever, for any time or times, does not include domestic servants: *Kitchen v. Shaw*, 7 A. & E. 729, 1 N. & P. 791.

Other examples of a restricted construction of the general words of a statute are *Rex v. Manchester Waterworks*, 1 B. & C. 680; *Rex v. Mosely*, 2 Id. 226; *Coolidge v. Williams*, 4 Mass. 140; *Sprague v. Birdsall*, 2 Cow. 419. And in the construction of deeds and wills, it is not unusual to confine general expressions by a regard to the context. Thus, "all my estate of what kind soever," being connected with words referring only to chattels, was held not to pass real estate: *Sanderson v. Dobson*, 1 Exch. 141.

In the present case the words, "tools, implements, and instruments," are carelessly used, and are mere surplusage, and the general words "personal property," are intended to include them. Why mention tools and implements if everything but real estate is to be confiscated? And if any specification is desired, why not specify the property much more important and more likely to be found in such a connection, namely, the stock in trade, notes, money, &c., before the general words? It cannot be doubted that the tools, implements, and instruments here forfeited, are those with which the unlawful business is carried on; and if that is so, does not their enumeration exclude all other tools, implements, and instruments? If a carpenter's tools, a surgeon's instruments, or a dressmaker's sewing-machine are found in a distillery, can they be forfeited as tools, implements, and instruments? If not, and if they are tools and nothing else, how can they be swept in as "personal property?" It must be on the very ground that they are *not* connected with the fraud, and then the statute will read thus, "all tools, implements, and instruments of the unlawful business shall be forfeited together with all other tools, implements, instruments, and personal property which have no such connection." No fair, sensible, or reasonable construction can be given to the particular words, without supplying the qualification which I have adopted; and when you have supplied that, it naturally restricts the operation of the more general words which follow, and the statute is read as forfeiting the tools, implements, instruments, and personal property connected with the

illegal business, and found within the building, yard, or enclosure where that business is carried on. This construction gives effect to all the language, because there are often many things connected with a trade or manufacture which are not properly described as either tools, implements, or instruments,—as for example fuel, fixtures, &c.

This construction entirely relieves the difficulty concerning the place or building, yard and enclosure, because it is reasonable that all things which are part of the unlawful business which are found within the same enclosure, whether inside or outside of the building, should be forfeited, and that all articles appropriate to such business which are so found, should be *prima facie* presumed to be connected with the fraud. This interpretation makes the whole law just, harmonious, and intelligible.¹

New trial granted.

United States Circuit Court, Eastern District of New York.

THE UNITED STATES v. QUANTITY OF RAGS, ETC.

The words "personal property" in section 48 of the Internal Revenue Act, forfeiting property used in illicit distilling, include all the property in the building where the still or spirits are found, whether of a nature to be used in the distillation of spirits or not.

What may be considered within the same building, yard, or enclosure.

This was an action under the 48th section of the Internal Revenue Law, to forfeit certain personal property, upon the following state of facts:—

One Young owned a brick house situated upon the part of a city lot; against the rear wall of which a stable had been formerly erected. The adjoining lot was also owned by Young, and had been covered with a wooden building having wide doors at each end constructed and used for a livery stable. The rear of both lots was enclosed together by a single fence across the two, thus forming one enclosure, from which the only access to the street for vehicles was through the livery stable; a small gate opened from the yard in the rear of the lots, and a swinging door had been constructed opening from the rear stable building to the

¹ See the next case.

brick house in front; another door opened from the side of the brick house into the livery stable. Young occupied the front brick building as a junk-shop, and leased the livery stable to one Sherman for a livery stable, and since that he leased the rear stable to other parties. It appeared that the rear doors of the livery stable were, on Thursday prior to the seizure, found fastened by a spring lock capable of being opened without a key; the snow in the rear then gave evidence of the passing of persons from the livery stable to the rear stable, and in the rear stable was an illicit still with mash in fermentation; on Friday the still was in operation; on Saturday night the officers made a descent upon the place. The lock upon the rear door of the stable was found to have been changed. The distillery was then in full operation under the care of two men both of whom fled through the swinging door into the junk-shop, and thence to the street; where one was arrested. No claim was interposed for the distillery property, but Young claimed the personal property seized in the junk-shop, and Sherman the horses, &c., seized in the livery stable. Both claimants denied any knowledge of the existence of a still in the rear stable. There was evidence that the smell of distillation in the rear building would necessarily be detected throughout the whole place. There was no evidence that either of them was interested in the still. Upon a motion to direct a verdict for the government,

BENEDICT, J., ruled that under section 48 of the Internal Revenue Law, the juxtaposition of the property proceeded against in the same place, or within the same enclosure with the illicit still, was sufficient to forfeit it; provided the owners of the property knew of the existence of the illicit still in the rear stable, and that under the evidence in the case the jury would not be warranted in finding that the existence of the illicit still was unknown to the owner of the place and the keeper of the livery stable. A verdict was accordingly directed in favor of the government.

The difficulties in the interpretation of a system of laws so entirely new in this country as the Internal Revenue Acts, are very strikingly shown in the two foregoing cases, in which two courts of equal authority, each composed of a

judge of great learning and experience, have come to precisely opposite conclusions upon one of the most important sections in the law.

The language of the Act of 1864 is, "all tools, implements, instruments,

and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles . . . shall be found."

It will be observed that, although it was not proved by the testimony in the last case, Sherman or Young were interested in, or knew of the existence of the still, except from surrounding circumstances, the court held the personal property in the buildings, which included horses, carriages, harness, &c., in the stable belonging to Sherman, and the property in the junk-shop belonging to Young, were forfeited. In other words, the juxtaposition and the suspicious circumstances of the property proceeded against within the adjoining buildings to the still, were sufficient to forfeit it. No doubt appears to have been suggested as to the propriety of extending the forfeiture to goods not in their nature adapted to the unlawful manufacture, and the attention of the court was directed chiefly, if not entirely, to the extent of *space* covered by the words "*in the place or building, or within any yard or enclosure,*" &c. The expression of the act "all . . . personal

property whatsoever," taken literally, would certainly include the horses in the livery stable as well as the property in the junk-shop, but the court would seem to have given a very liberal construction to so severe and penal an act, in holding that the stable and shop, under the circumstances, were included "in the place or building, or within the yard or enclosure." On the other hand, the District Court in Massachusetts, by taking the words "all personal property" as merely *in pari materia* with tools and implements capable of being used in the illegal manufacture, has essentially reduced the severity of the act, and perhaps in practice may be found to have materially impaired its efficiency. The different points to which the attention of the two courts was directed may fairly account for the difference of construction, but the section itself is too important, and the interests involved too large, to be long without an authoritative exposition, and we presume a case will shortly find its way to the Supreme Court, the ultimate tribunal to set the matter at rest.

J. F. B.

District Court of the United States, Northern District of Georgia.

MATTER OF JONATHAN J. MILNER, A BANKRUPT.

A promissory note, the consideration of which was a loan of Confederate money, is not provable as a claim in bankruptcy against the maker.

Per ERASINE, J.: Confederate treasury notes were not bills of credit within the prohibition of the Constitution of the United States; but were illegal, because issued by a pretended and revolutionary government set up within the limits of the United States.

In 1863 John Neal loaned \$2500, in "Confederate treasury notes," to Milner, the bankrupt, for which amount he made his promissory note to Neal. Subsequently, Neal gave this note to his son-in-law in trust for minor children of his daughter.

The trustee sought to prove this claim against the estate of the bankrupt. Counsel for the latter objected: First, because the consideration for the contract was Confederate treasury notes; secondly, because these notes were borrowed for the purpose of hiring a substitute to serve in the Confederate army, with the knowledge of Neal; and that the notes were so appropriated, and the substitute hired therewith did go into the said army.

Evidence being heard on these points, the register rejected the claim, and the proceedings were certified to the court. The conclusion at which the register arrived was approved by the court, but, on petition, a rehearing was had before the register on the ground that the evidence did not warrant the conclusion that Neal knew the purpose for which the money was borrowed. The register, however, adhered to his former opinion, and it was again certified to the court.

ERSKINE, J.—From the views which I entertain of the legal principles involved in this proceeding, it is not essential to an approval or disapproval of the conclusion at which the register arrived, that these Confederate treasury notes, or any portion of them, were used to procure a substitute to serve in the Confederate army, or that they were employed for any other purpose. The register holds, as he held at first, that the contract was illegal and void; and this result I approve and affirm. But I do not concur with him in one of the principal reasons advanced for his decision; and which reason is more prominently argued in his first written opinion than in his last, namely, that these notes were bills of credit within the sense of that term, as understood in the Constitution. He said: "Art. 1, sec. 10, clause 1, of the Constitution declares, among other things, that 'no state shall enter into any confederation,' or 'emit bills of credit.' It follows, then, that the confederation styled the Southern Confederacy, was entered into by the several states of which it was composed, in direct violation of an express provision of the supreme law of the land. As no state can constitutionally 'emit bills of credit,' it follows, as a matter of course, that no confederation of states can do so without bidding defiance to the Constitution. The issuance of Confederate treasury notes was not only an illegal act within itself, but was doubly illegal, having been done by an illegal confederation."

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit," &c.: Const. U. S. Art. 1, Sec. 10, p. 1.

No disquisition on the origin of bills of credit, or history of their rise and progress, or of their fall, under the inhibition just cited, would aid in the determination of this case. Therefore I will but remark, that the great minds who framed the Constitution were, from recent experience, aware of the blighting effect on the domestic and foreign commerce of the states, and on the welfare of the whole country, which flowed from the almost indiscriminate issuing of these bills by the colonies, and afterwards by the states, as a circulating medium or as money among the people, to suffer its perpetuation, or to longer tolerate it to the states—and time has proven the wisdom of their statesmanship.

So far as I have been able to ascertain, all paper answering to bills of credit put forth during the war of Independence, were promises to pay. But, be this so or not, the Supreme Court of the United States, in *Craig et al. v. The State of Missouri*, 4 Peters 410, held, that a paper currency emitted by a state, and receivable in discharge of all debts and taxes due the state, and of all salaries and fees of office, &c., &c.—and pledging the faith and funds of the state for the redemption of these paper issues—was within the constitutional prohibition.

The same court, in *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Peters 258, gave the following comprehensive definition of a bill of credit: "The definition, then, which does include *all* classes of bills of credit emitted by the colonies, or states, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."

Taking this definition as imparted by the highest judicial tribunal in the land, it will conduct to a correct conclusion the endeavor to ascertain whether these treasury notes or bills, issued by the so-called Confederate States, fall within it.

Although it is declared that no state shall emit bills of credit; yet if two or more of the states ally themselves or confederate together, and on their faith and credit issue these bills, I apprehend, the inhibition would apply with a force equally as direct and controlling against the allied or confederated states as against a single one.

Here is a copy of one of these treasury notes:—

"Fundable in eight per cent. stock or bonds of the Confederate States. Six months after the ratification of a treaty of peace between the Confederate States and the United States, the Confederate States of America will pay five dollars to bearer. Richmond, September 2d 1861.

"Receivable in payment of all dues, except export duties."

Then follow the names of a register and treasurer.

One decision—and only one—on this subject has been brought to my notice; that is the case of *Bank of Tennessee v. Union Bank of Louisiana*, lately tried before Judge DURELL, and a jury, in the Circuit Court of the United States for the Eastern District of Louisiana, and published in the *American Law Review* for January, 1868. The judge is there reported to have said, in his charge to the jury, "that confederate treasury notes issued by said government, and circulated as money, were bills of credit within the meaning of the Constitution; and therefore an unlawful issue." The views which present themselves to my mind do not terminate in accord with the opinion expressed by that learned and able judge.

During the years 1860 and 1861, South Carolina, Georgia, and other states, by similar modes, called on the people to send delegates to meet in convention. Accordingly, these conventions assembled, and each passed an ordinance of secession, as it is generally termed, by which ceremony, these conventions severally adventured to withdraw the states from the Federal Union, and to release the people from their subjection to the laws of the land, and their allegiance to the Nation. The constitutional state governments were overthrown, and superseded by spurious and revolutionary governments. The setting up of a pretended central or general government styled "The Confederate States of America" followed; and, soon thereafter, open rebellion, and war of portentous magnitude burst upon the nation: *Vide The Prize Cases*, 2 Black 635, and *Shortridge v. Mason*, United States Circuit Court, District of North Carolina: 2 Am. Law Review 95.

In the seceded states (so called) the sovereign authority being for the time displaced, consequently, there ceased to be, within any of them, a government under the Constitution of the United States. Then, can it be said that the usurping power could pledge the faith of the state by a public law, or otherwise, for

the payment of the treasury notes issued by the so-called Confederate States of America? Or could this pretended general government bind any of those states for the redemption of these notes?

But these Confederate treasury notes or bills do not pretend to have been emitted by a state, or a combination of states of the Union; nor can it be inferred from indicia found upon them,—nor can their recondite history show—that they emanated from the sovereign power, and on the faith of any of the states. And thus it will be seen, that they did not possess the characteristic attributes of bills of credit, in accordance with the definition of the Supreme Court of the United States; they did not issue by virtue of the sovereignty of the state, nor did they rest for their currency on the faith of the state pledged by a public law: *Darlington et al. v. State Bank of Alabama*, 13 How. 12.

Notwithstanding these notes or bills were not, in my judgment, bills of credit within the prohibition contained in the tenth section of the first article of the constitution; yet they were none the less illegal; they were issued by a pretended government, organized in the name of certain states, by subjects and citizens of the United States, and who, at the very time, were in rebellion against their rightful government, and whose design and object was to “dismember and destroy it:” *The Prize Cases*.—*Shortridge v. Mason*, *supra*.

It may not be wholly unimportant to remark, that it is a well-established doctrine of the courts, that a wide distinction exists between an *executed* and an *executory* contract. In the former, they will not, as a general rule, interfere between the parties, to set the contract aside, but will leave them where they placed themselves; and this, too, notwithstanding the contract be, in part, or in whole, founded on an illegal consideration. And one owning property may—if no fraud be put upon him, and no misrepresentation or circumvention or covin enter into the transaction—alienate it—absolutely, for what currency or thing he pleases, or even give it away. But an *executory* contract, like this claim of Bailey, the trustee, against the assets of the bankrupt Milner, will not be enforced. The principles of law directly applicable to *executory* contracts, based upon illegality, were long since determined by the courts, both in England and in this country. One case only will be referred to. The doctrine, as

laid down by Mr. Justice Washington, in *Toler v. Armstrong*, 4 Wash. 296, is so succinctly announced, that it is best it be given in his own words: "I understand the rule, as now already settled, to be, that where the contract grows *immediately* out of, and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in part only, connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it."

If this demand of twenty-five hundred dollars were allowed, the dividends of the creditors, arising from the assets, would be diminished that amount; and this without any fault on their part, but wholly through the illegal dealings of the bankrupt and others: Bankrupt Law, sec. 22.

I may add, that the law, in allowing a guilty party to take advantage of the illegality of his own act—as is here done by the bankrupt—does so, not with a view of conferring a benefit on him, but upon grounds of public policy, and also in this case, that justice may be done to the creditors of Milner.

The decision of Mr. Register Murray is approved.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF NEW YORK.²

AUCTION SALES.

Agreement not to Bid.—The rules about judicial sales which make void as against public policy, agreements that persons competent to bid at them will not bid, make void such agreements alone as are meant to prevent competition and induce a sacrifice of the property sold. An agreement to bid, the object of it being fair, is not void: *Wicker v. Hoppock*, 6 Wall.

BROKER. See *Stock*.

CHECKS.

Not an Assignment of Funds.—Checks drawn in the ordinary general

¹ From J. William Wallace, Esq.; to appear in Vol. 6 of his Reports.

² From Hon. O. L. Barbour: to appear in Vol. 49 of his Reports.

form, not describing any particular fund, or using any words of transfer of the whole or any part of the account standing to the credit of the drawer in the bank upon which they are drawn, but containing only the usual request directed to the bank, to pay to the order of the payee named, a certain sum of money, are of the same legal effect as inland bills of exchange; and do not amount to an assignment of the funds of the drawer in the bank: *Lunt et al. v. The Bank of North America*, 49 Barb.

COMMON CARRIER.

Special Damage—Practice.—In a suit against a common carrier for not carrying a party according to contract, the allegation of a breach "whereby the plaintiff was subjected to great inconvenience and injury," is not an allegation of special damage: *Roberts v. Graham*, 6 Wall.

An objection of variance between allegation and proof must be taken when the evidence is offered. It cannot be taken advantage of in the appellate court: *Id.*

Limitation of Liability.—Common carriers of goods may by express stipulation limit their liability for the loss of goods occurring from even the negligence of their agents and servants; or wholly exempt themselves from such liability; and the acceptance by the bailor from the bailee, in the ordinary course of business, of a receipt for the goods, containing such a stipulation, creates a binding contract. But the liability of the carrier will continue, as established by the common law, in respect to all matters not expressly stipulated against: *Prentice v. Decker*, 49 Barb.

The putting into the hands of a passenger, on receiving her baggage for delivery at her residence, of a card containing a clause limiting the liability of the carrier to a specified amount, except by special agreement to be noted on such card, will not, without further proof from which the assent of such passenger to the terms thereof may be implied, establish such a contract: *Id.*

Such a contract relates only to the carrier's liability as an insurer of the goods, and imparts no exemption from liability for actual negligence. And it applies only to deliveries to railroads and steamboats: *Id.*

Who may sue.—The legal title to wearing apparel and jewelry, provided by a father for the use of his infant daughter, remains in him, notwithstanding the possession of them by the infant. And for the purposes of an action by the father, against a common carrier, to recover for the loss of such property, the daughter must be treated as the legally constituted agent of the plaintiff: *Id.*

CONSTITUTIONAL LAW. See *Railroad Companies.*

CONTRACT.

To Pay Money—Measure of Damages.—On a breach of a contract to pay, as distinguished from a contract to indemnify, the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken: *Wicker v. Hoppock*, 6 Wall.

CRIMINAL LAW.

Warrant of Arrest.—It is never necessary to state in a criminal warrant the evidence by which the charge is to be supported. All that is required in that particular, is to "recite the accusation." This requirement is satisfied by a statement which indicates, with reasonable certainty, the crime sought to be charged: *Pratt v. Bogardus*, 49 Barb.

Where a warrant, issued by a justice of the peace, after stating time and place, alleged that the defendant "designedly by false pretences, did obtain from" the complainant "one sulky of the value of \$30, the property of * * * with intent to cheat and defraud" the complainant. *Held*, that this was a valid warrant upon a complaint for obtaining property by false pretences, although the pretences used were not set out therein: *Id.*

Jurisdiction of Magistrate—His Protection.—Where, in issuing a criminal warrant, a justice of the peace possesses, and is exercising a general jurisdiction of the subject-matter, and not a special jurisdiction over a particular offence created by statute, and thereby restricted as to the manner of proceeding, all that is required to protect him in so doing, is that the evidence produced is colorable—something upon which the judicial mind is called upon to act, in determining the question of probable cause: *Id.*

Where the affidavit upon which an application for a warrant was made, stated, in substance, that the defendant did designedly and by false pretence, obtain from the complainant one sulky of the value of \$30, by falsely stating and representing to him that his own sulky was hard to ride in, and that he desired the complainant's sulky to go to Albany, and would return it the next week, but that on the contrary he shipped it from Albany to Fort Plain, with intent to cheat and defraud the complainant: *Held*, that this was colorable evidence, sufficient to call upon the justice to exercise his judgment, in determining the propriety of issuing process; and that, having acted in good faith, he should be protected: *Id.*

Effect of a General Verdict.—A general verdict, in a criminal case, is equivalent to a special verdict finding all the facts which are well pleaded in the indictment: *Fitzgerald v. The People*, 49 Barb.

Where, upon an indictment charging the prisoner with having committed the crime of murder in the first degree, the jury find a general verdict of guilty, the court is justified in pronouncing a judgment sentencing him to be hung: *Id.*

Indictment.—A common law indictment for murder is good and sufficient, in form, to charge the statutory definition of the crime; i. e., the premeditated design to effect the death of the person killed, which the statute makes an indispensable ingredient of the crime, is comprehended in the averment of a wilful and felonious killing with malice aforethought: *Id.*

DEBTOR AND CREDITOR.

Fraudulent Sale—Liability of Purchaser with Knowledge.—A purchaser of a stock of goods from a debtor confessedly insolvent, where the purchaser knows that the debtor's purpose is to hinder and delay a pa

ticular creditor. and also that if the debtor intended a fraud on his creditors generally, the purchase would necessarily be giving him facilities in that direction, is not responsible in equity (the sale being an open one, for a fair price, and followed by change of possession), for any part of the consideration-money which the debtor had applied to payment of his debts; but is responsible for any part which he has diverted from such payment: *Clements v. Moore*, 6 Wall.

Statements either oral or written made by the vendor after such a sale are incompetent evidence against the purchaser on a suit by the particular creditor to set the sale aside: *Id.*

Charges of Factor.—The proper charges and expenses of converting a security into money are first to be deducted from the gross proceeds; and it is the balance only, which is applicable to the discharge of the debt: *Sheldon v. Raveret*, 49 Barb.

This is especially so, when the creditor is also the factor of the goods; he having a lien for all those charges, which cannot be diverted without his consent. The factor is accountable only for the balance, after deducting his charges and expenses: *Id.*

DEED.

What passes by.—M. and W. were the owners of adjoining farms; that of M. lying between the farm of W. and the public highway. M. conveyed to W. a strip of land twenty-four feet wide, and extending from the land of W. to the highway, “for a private road.” And the grantee covenanted that the grantor, his heirs and assigns, might “have free and full permit to travel the said road.” The deed contained the usual covenant of warranty. *Held*, that the deed conveyed the strip of land in fee; the covenant on the part of the grantee, securing to the grantor the right to travel upon the said road, being consistent with the assumption that the grantee was to, and did, become the owner of the land, reserving to the grantor merely the right to travel thereon: *Kilmer v. Wilson*, 49 Barb.

EQUITY.

Practice and Pleading.—A complainant in chancery cannot by waiving a verification on oath to the defendant’s answer, deprive such answer, when made without such verification, of its ordinary effect: *Clements v. Moore*, 6 Wall.

In chancery when an answer which is put in issue admits a fact, and insists on a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved, otherwise the admission stands as if the fact set up in avoidance had not been averred: *Id.*

In this case, three answers in chancery denying allegations made in a bill, of fraud on creditors by an admitted conveyance of real property on the part of an insolvent debtor to his wife through a third person, *held* not to disprove the allegations; the answers being discrepant in striking particulars from each other, and, as respected the consideration, with the deeds themselves; no proof being given of the mode of payment by the third person (who, it was set up, had purchased the property from the husband, for himself, and afterwards sold it to the wife on payment from her separate property), nor any proof beyond the answers of her husband

and herself and a previous statement of the husband, then arranging the transaction, that the wife ever had any separate property : *Id.*

EVIDENCE. See *Debtor and Creditor.*

FALSE REPRESENTATIONS.

As to Another's Solvency.—Though an individual is not obliged to answer inquiries in respect to the solvency of a third person, yet, having undertaken to do so, he is bound to speak truthfully, and is not at liberty to suppress a fact within his own knowledge, bearing materially upon the pecuniary responsibility of such third person : *Viele v. Goss*, 49 Barb.

Where the defendant, on being inquired of, by the plaintiffs, in regard to the solvency of another, omitted to state in his reply, the fact that the latter was largely indebted to him at the time, and alluded to his indebtedness in such a manner as would naturally have the effect to quiet any apprehension on that subject, and produce the impression that it was quite inconsiderable; and within a few months, the indebtedness of such third person to him ripened into a judgment which absorbed the entire property of the debtor; it being shown that had the extent of such debtor's liability to the defendant been stated, credit would have been refused to him by the plaintiffs. *Held*, that the defendant was liable to the plaintiffs for the value of goods sold to such third person, on the strength of the defendant's representations : *Id.*

PRACTICE.

Setting aside Verdict.—Where the real question involved in an action has not been presented, or determined, the verdict will be set aside : *Burwell v. Greathead*, 49 Barb.

PROMISSORY NOTES.

Defence to.—In an action upon a promissory note, brought by a person who is not a *bonâ fide* holder thereof, he having assumed no liability nor parted with anything as a consideration for the delivery of the note to him, any defence which could have been interposed by the defendant to the note in the hands of the payee, is available to such defendant : *Van Valkenburgh v. Stipplebeen*, 49 Barb.

RAILROAD COMPANIES.

Compensation to Property Owners.—A. being the owner of a mill factory, together with the easement or right to carry the waters of a creek across a certain parcel of land thereto, the defendant, for the purpose of constructing its railroad, acquired by purchase a portion of the land subject to such easement. The road being constructed in such a manner, and upon such a grade, that the water could no longer be conveyed to the factory across the land in a straight trunk, the defendant took down the original raceway, and carried the water under the railroad track, in a new trunk built for that purpose. A. accepted the new structure without objection, and used the water flowing through it during his life. *Held*, that such acceptance of the substituted structure was in judgment of law a compensation for all damages sustained by A.

in consequence of the removal of the original raceway: *Arnold et al. v. The Hudson River Railroad Company*, 49 Barb.

The legislature may rightfully authorize the construction of railroads or other works of a public nature, without requiring compensation to be made to persons whose property has not actually been taken, or appropriated for the use thereof, but who may nevertheless suffer indirect or consequential damages by the construction of such works: *Id.*

The case of a railroad company acquiring its roadway subject to an easement or servitude appurtenant to mill property, consisting of the right to carry water across the land of another to the mill, is within the above principle: *Id.*

If the owners suffer an injury by having the easement impaired, this is an injury which the property suffers in consequence of the construction of a public work, under legal authority, and not the *taking* of the property: *Id.*

Such a loss is to be regarded as *damnum absque injuria*, except in cases where, by statute, compensation is required to be made: *Id.*

RECEIVER,

Effect of Executing a Bond to.—The execution of a bond by the defendant, to the plaintiff *as receiver*, is to be deemed an admission by the obligor, not only that the plaintiff has been duly appointed receiver, but also that the receiver is authorized to bring the action mentioned in the condition of the bond: *Scott v. Duncombe*, 49 Barb.

When in an action upon such a bond, the defendant does not allege in his answer that the plaintiff has not been regularly appointed receiver, it is not necessary for the plaintiff to introduce even the original order appointing him receiver, or his bond as receiver: *Id.*

Action upon Bond to.—The surety in a bond given to a plaintiff suing as receiver, conditioned to pay any sum the plaintiff may recover against the principal obligor, in that action, is liable for the amount of judgments recovered in cases where the obligee is appointed receiver subsequent to the execution of such bond, as well as for the amount of those recovered previously: *Id.*

STOCK.

Pledge of.—A purchase of stocks, by brokers, as agents for another, with an advance of money by the former on account of the latter, upon condition that the principal shall deposit a margin of ten per cent., and deposit a further margin when required by the agents, is not to be considered a pledge of stocks for the payment of a sum of money advanced thereon, and requiring a notice of the time and place of selling the pledge to make the sale legal: *Hanks v. Drake et al.*, 49 Barb.

Right of Agents to Sell.—Under such an agreement, the agents have a right, upon the principal's failing to deposit a further margin when required so to do, to sell the stock and close the transaction: *Id.*

But before the owner of the stock can be called upon, under such a contract, to deposit any additional margin, the agents should give him notice that his margin is diminished, and that they require a further margin. And a reasonable time to comply should be allowed, before the stock can be sold: *Id.*

Where agents, within two hours after giving notice to their principal that a further margin was required, no time being specified for compliance, sold the stock and rendered an account of sales. *Held*, that the court could not hold, without further evidence, that reasonable time for performance had been given. That to decide that point, as matter of law, the facts should appear, by which the court could say the party was able within the time given, to do the act required, and therefore that the time was reasonable: *Id*.

Ratification of Sale by Agents.—Where the owner of stocks received information of a sale thereof by his agents, in May, and remained silent until September, when he demanded an account of sales, which was sent to him, with a check for the balance due him, which he indorsed and collected, *Held*, that this amounted to a full *ratification* of the sale; and that it was too late for him afterwards, to seek to set it aside: *Id*.

NOTICES OF NEW BOOKS.

THE CONSTITUTIONAL CONVENTION ; its History, Powers, and Modes of Proceeding. By JOHN ALEXANDER JAMESON, Judge of the Superior Court of Chicago, and Professor of Constitutional Law, &c., in the Law Department of Chicago University. 8vo., pp. 561. New York: Chas. Scribner & Co. 1867.

We have had the above-named work upon our table for several months past, and have been unwilling to speak of it until we could find an opportunity, not easily obtained in the pressure of various duties, to read it carefully and completely through.

In no other country could such a book have been produced, and certainly at no other time even here could it have been produced so opportunely. Constitutional conventions are a peculiar feature of the political institutions of the United States, and at present, of all times in our history, their "powers and modes of proceeding" are of the most vital interest. The principles of popular government occupy the conversation of nearly all men in this country, and from the foundation of the government there have never been wanting men of master minds who have given to political science a profound study. But the conflict of interests and the discussion of principles has generally been upon the construction of written constitutions and the practical powers of the government or its officers under them. Judge JAMESON however has gone deeper, and in the present work has examined the legal powers of the people themselves in the formation of their governments and the principles by which they are properly guided in the establishment or change of constitutions under the forms of law. In one sense this may be called an inquiry into the precise limits of the ultimate right of revolution and the proper or justifiable occasions for its exercise. In the course of this inquiry many topics of the most vital and permanent political interest from the foundation of the American governments down to the changes of fundamental law now in process, come under discussion, and perhaps there is no better

way of conveying an idea of the work in a notice necessarily brief than by an enumeration of the topics treated and the order of their discussion.

Chapter First treats of the various kinds of conventions—the spontaneous convention or public meeting, the legislative or General Assembly, the revolutionary, and the constitutional convention proper. From this the author passes to a close analytical discussion of Sovereignty, its definition, its marks and attributes, its modes of asserting itself, and its *locus* as a question of fact in the United States, the several states, and the people of America. Chapter Third treats of Constitutions, as objective facts and as instruments of evidence, and the internal structure of American constitutions in general. Chapter Fourth, of the Requisites to the Legitimacy of Conventions, and their history—including the mode of calling a convention (with a detailed historical sketch of the American conventions held from 1775 to the present time), and the proper election of conventions. Chapter Fifth, of the Organization and Mode of Proceeding of Conventions. Chapter Sixth, of the Powers of Conventions, including their powers with reference to their external relations, particularly to the sovereign or to sovereign rights, to the state as a whole, to the electors, and to the several departments, executive, legislative, and judicial, of the government, and their powers with reference to their internal relations, to their organization, maintenance of discipline, and the prolongation or perpetuation of their own existence. Chapter Seventh, of the Submission of Constitutions to the People. And Chapter Eighth, of the Amendment of Constitutions. To these are added an Appendix containing A List of all the Conventions held in the United States; The objections of the New York Council of Revision to the New York Convention Act of 1820; The opinion of the Supreme Court of Massachusetts on the powers of conventions to propose amendments to the constitution; The opinion of the Supreme Court of New York on the power of the Legislature to modify a Convention Act which has been voted on by the people; and the Official Proceedings culminating in the reassembling of the Louisiana Convention of 1864 in July 1866.

From the foregoing it will be seen that this is a treatise on the fundamental constitutional law, exhibiting a comprehensive grasp of the subject, a good analytic method, and profound and faithful research, and cannot fail to do much to correct the crude general notions as to the indefinite powers of conventions.

It is scarcely necessary to say that the style of the book is strictly legal, and while dealing of course with subjects of the profoundest political interest, it is calm and dispassionate, with no trace of partisan bias in any direction. The topics are treated philosophically, in a liberal, critical, but not dogmatic style and are illustrated copiously and with much detail by examples in American political history. Altogether it is a contribution to general and constitutional jurisprudence of which the country may well be proud, and we heartily commend it to the notice of the profession as well as to the student of our political history.

J. T. M.

REPORTS OF CASES ARISING UPON LETTERS-PATENT FOR INVENTIONS, determined in the Circuit Courts of the United States. By SAMUEL S. FISHER, Counsellor-at-Law. Vol. I., 8vo., pp. 700. Cincinnati: Robt. Clarke & Co., Printers. 1867. \$25.

It is not often that an active and very successful practitioner steps aside from his daily treadmill of practice to try his hand in the equally laborious but different task of reporting. It was therefore with much pleasure and some curiosity that we took up the above substantial volume from the pen of one of the busiest members of the profession. Being reports of cases upon a special department of the law, with which we have only the most limited acquaintance, we do not propose to say much upon the decisions, though we have read many of them with an interest akin to that excited by a romantic chapter in history. "There is not a case in the books," says a brilliant and witty pamphleteer, unfortunately anonymous, "that does not stand like an Alpine cross to mark the scene of some tragic event;" and no one can look through this volume without feeling impressed with the labors, the trials, the disappointments, and the only occasional triumphs of inventors even in this land of ready appreciation of mechanical genius. We meet here also with more or less fulness, the history of the principal American inventions that have attracted public attention in the last twenty years, among which we may name the Electric Telegraph, the Sewing Machine, the Reaping Machine, the Repeating Fire-Arms of various kinds all founded on the yet unrivalled Colt's Revolver, the Goodyear India Rubber, Fire-Proof Safes, Janus Faced Locks, and others perhaps only a little less important though not popularly so well known.

The design of the reporter is, we believe, to collect all the unreported cases upon patents, hitherto decided in the courts of the United States, and to do this it has been found necessary to add a second volume. This will give the profession a complete body of American patent law so far as it has been the subject of judicial exposition, and the workers in this specialty are under very great obligations to Mr. Fisher for the thorough, laborious, and satisfactory manner in which he has performed his work. The cases are arranged chronologically, and are admirably reported with as much brevity as the intricacy of statement required to make clear the points involved, would permit. Incidentally a good deal of law is contained in the book, not exclusively applicable to patents, much of course that is not new, but much that may be read with profit even by the general practitioner.

In conclusion we may say that the book, which is printed by Messrs. Clarke & Co. for the reporter, is by far the handsomest piece of work that we have ever seen from the Western press, and would do credit to any publishing house in the country. On one point only we are forced to give it our condemnation, and that is the deep pink tint of the paper, which we found exceedingly trying to the eye, especially at night.

We understand that a very small edition has been printed, and advise libraries and patent lawyers to be prompt in securing the few remaining copies.

J. T. M.

THE
AMERICAN LAW REGISTER.

MAY, 1868.

LIABILITY OF DOWRESS FOR TAXES ASSESSED DURING THE
HUSBAND'S LIFE.¹

JOHN HARRISON at his death was seised in fee of thirty lots in the city of New York. He was married on the 26th of November 1860, and died on the 5th of August 1861, having made his will, leaving all his real and personal estate to George Harrison and making him his executor.

At the time of the marriage there were upwards of \$11,000 of unpaid state, city, and county taxes on the thirty lots, which had been imposed for the years 1856, 1857, 1858, 1859, and 1860; during the year 1861 taxes to an amount exceeding \$2000 were assessed on said lots, which assessment was confirmed on the 20th day of September 1861; all these taxes remained unpaid at the death of John Harrison.

In November 1861, the devisee, by agreement with the widow, set apart ten of the lots to her as her dower, and retained the other twenty released from any claim on her part.

The personal property of John Harrison, which came into the hands of George Harrison as legatee and executor, was sufficient to pay all the taxes on John's estate at the time of his death, but not sufficient to pay the taxes and all the other debts of John.

¹ We are indebted to HON. CHARLES P. KIRKLAND, of New York, for the following case and opinion, upon a novel point in the law of Dower. ED. AM. LAW REG.
VOL. XVI.—25 (385).

After the ten lots were set apart to the widow, as above stated, George Harrison paid several thousand dollars of the taxes above mentioned, partly out of the personal property of John, and partly by sale made by order of the surrogate, of some of the twenty lots above mentioned, as released by the widow, and he then brought an action to recover from her the proportion of taxes due on the lots set apart to her.

The action was referred to Hon. CHARLES P. KIRKLAND, who reported his opinion as follows:—

The only question really in litigation between the parties in this action is, Whether the defendant is bound to contribute toward the payment of the taxes which existed at the time of the marriage and at the time of her husband's death, on the premises of which he was seised during the coverture. In other words, Whether a dowress, as between her and the devisee, legatee, and executor of her husband (the same person being devisee, legatee, and executor), is bound to pay or contribute toward the payment of any taxes existing at the time of her marriage and of the death of the husband, on the premises assigned to her for dower, or on any of the premises of which the husband was seised during the coverture.

It is a singular and interesting fact that, though this question must have very frequently arisen, yet no adjudicated case, deciding the precise point, has been cited by the learned counsel who conducted the case before me, nor is the rule governing the case stated by any elementary writer, so far as their examinations have discovered; nor have my researches been any more successful. This fact gives additional interest to the question and leaves it to be decided purely on *principle*.

I. Estates in dower have always been regarded with great favor *in the law*, and the widow's rights have been watched over and protected with jealous care.

The tenant in dower is so much favored that it is the common by-word in the law, that the law favors three things: (1) life; (2) liberty; (3) dower: Bacon on Uses 37.

From the earliest period of the existence of the common law, a very extraordinary favor was bestowed in the administration of justice on this provision for a wife surviving her husband: Park on Dower 2.

Dower is, indeed, proverbially the foster-child of the law, and

so highly was it rated in the catalogue of social rights as to be placed in the same scale of importance as life and liberty.

Favorabilia in lege sunt vita, fiscus, dos, libertas, was the maxim of the courts: Id. 3.

Dower is often the only certain resource of widowhood; it has for its object the sustenance of the widow and the nurture and education of her children: Id. 3, 5.

This doctrine has continued from and anterior to the time of Bacon down to this day; and the most modern cases repeat the proposition that the widow's estate in dower is favored in the law: *Matter of Sapperly*, 44 Barb. 370; s. L., 13 Barb. 106, and 4 Barb. 20.

So carefully, indeed, is this right protected, that a deed, given *before marriage*, by a husband to his daughter without consideration, was adjudged *void* against the widow's *dower*, as well as against a subsequent mortgage: 5 Johns. Ch. 482.

We thus see the estimation in which this right has always been, and still is, held by the law; and we are thus furnished with a very clear as well as a very certain light to guide us to a proper conclusion on this occasion.

II. On *general* legal principles, irrespective of the above considerations, the dowress should have preference to the devisee:—

(1.) As *between him and her*, she well may be regarded, in a legal sense, as a purchaser for a valuable consideration, whereas he is purely and merely a volunteer, the bare recipient of a *gift*. The law in such cases is uniform; it will always protect the former as against the latter, whenever such protection is possible.

The wife is the helpmate of the husband; she stands towards him in the most intimate and confidential of all human relations; in the performance of her share of duty, she aids him in the acquisition of his property; she is in every sense, practical and legal, a *meritorious* (as distinguished from a *voluntary*) party in regard to her estate in dower.

It would be repugnant to every sentiment of justice and of right, that a party thus situated should not in every possible way, have preference to a party who is a mere volunteer, a gratuitous donee, without the slightest *meritorious* claim, and such a party is this devisee.

(2.) The tax was laid and assessed on the vested, *existing*

visible estate of the husband, not on the inchoate, intangible, merely possible estate of the wife.

III. On examining carefully the various provisions of the statute law of this state, we find enough to justify us, nay to compel us, irrespective of the foregoing considerations, to carry into *practical* effect, the doctrine that dower is an estate "favored in the law."

(1.) The revised statutes provide that executors and administrators shall pay the debts of the deceased in the following order.

(1.) Debts due to the United States.

(2.) Taxes assessed on the estate of the deceased prior to his death.

(3.) Judgments, &c., &c.

The duty and the burden of paying taxes are thus plainly imposed on the representative of the *personal* property: as between the real and the personal estate, the latter is charged with this burden, to the exoneration of the former.

It is very clear, that in no event could the party entitled to the personal estate, call on an heir or devisee for repayment or indemnity, not even if the personal estate were large and valuable, and was entirely exhausted in the payment of taxes, the real estate being also very valuable and entirely free from encumbrance. If, in such case, neither heir nor devisee could be required by the party entitled to the personal property, to pay, or even to contribute toward the payment of the taxes, by parity of reason, indeed, for much stronger reason, a dowress could not be so required. The payment thus made would result to the benefit of the heir by the extinguishment of the encumbrance on his estate; by what reasoning can it be shown, that it should not also, and equally, result to the benefit of the dowress? More emphatically must this be so where, as in the present case, the personal estate was *sufficient* to pay the taxes.

It was thus the *duty* of the executor to pay the taxes; he can make no claim to them, or any part of them against the dowress?

The case here is rendered still stronger, if any necessity existed for further reasoning, by the fact that the devisee, the legatee, the executor, are one and the same person.

(2.) Personal property is without doubt the *primary* fund for the payment of taxes. This is manifest from the provisions of

the act just cited, and equally, if not more clear, from the provisions of another act which makes it the duty of the supervisors to issue a warrant to the collector for the collection of the tax, and in case of non-payment, makes it the duty of the collector to levy the same by distress and sale of the *goods and chattels* of the party taxed, or of any goods and chattels *in his possession*; if the collector fails to collect, he is to make return to the county treasurer, and he subsequently returns to the comptroller, who then takes the requisite steps to collect, &c.: 1 R. S. Edm. ed. 367, s. 37; 369, s. 2; 374.

In this very case if the officers charged with the collection of the taxes, had done their duty, it cannot be doubted that the taxes in question prior to 1861, would have been collected from or paid by the husband in his lifetime. At any rate, it is certain that, during the husband's life, his goods and chattels, and after his death, his personal property, is the primary fund for the payment of taxes.

(3.) The debt was the debt of the husband to be paid by him, and not the debt of the wife to be paid by her; if the officers of the law neglected to collect, and the husband neglected to pay, the consequence of these defaults in duty on the part of the officers, and of the husband, surely ought not to be visited on the wife, when she becomes a *widow*.

(4.) The act for the admeasurement of dower strongly confirms the proposition that the dowress is not to be charged with the taxes assessed, prior to or during the coverture: 2 R. S. 491, ss. 13, 17, 18, 1st ed.

The 13th section provides that the admeasurers shall take into consideration certain improvements made on the premises; and it provides for no other *deduction* from the value of the premises to be assigned for dower; it not only does not charge the taxes on the dowress, but by implication exonerates her from them, for the 18th section provides that the widow may bring ejectment for the premises admeasured to her and may hold the same during life, subject to the payment of all *taxes* and charges accruing thereon *subsequent* to her taking possession.

On the general rule in the construction of statutes (as well as of contracts) *expressio unius est exclusio alterius*; and, therefore, by providing expressly that she should be liable for *subsequent* taxes, the just, if not the necessary, inference is, that she

is not to be liable for such as existed previous to her taking possession.

It is difficult to imagine a case to which the rule of *expressio unius, &c.*, could be more justly and more properly applied than the case now under consideration.

I am thus irresistibly led to the conclusion, that the defendant is not, as between her and George Harrison and his representatives the plaintiffs, liable or bound to pay any part of the taxes existing at the time of her marriage, or at the time of the death of John Harrison; and, of course, if any such taxes have been paid by her out of her property, that she has the right to claim and recover them from the plaintiffs.

IV. It must be remembered, that the question here is between the dowress and the *devisee* of her husband; not between her and *creditors* having a lien on her husband's real estate, existing at the time of the marriage. The latter have preference to her, and her dower is subject to all such liens. This proposition is too clear and too reasonable to require the citation of authorities on the subject—of course her dower rights are subject to all existing *taxes whenever* imposed; the practical meaning of which is, that the government (state or municipal) has the right to collect the taxes out of the estate irrespective of dower.

If the taxes are collected in whole or in part, out of the interest or estate of the dowress, whether actually set apart to her after her husband's death or not, she has her resort to the heir, devisee, or executor, as the case may be, for reimbursement.

RECENT AMERICAN DECISIONS.

Supreme Court of Missouri.

EDWARD S. ROWSE v. WASHINGTON UNIVERSITY.

A legislative concession embraced in the charter of a corporation perpetually exempting its property from taxation, without a sufficient corresponding consideration yielded by the corporation, is revocable at the pleasure of the state. And the act of the state in revoking such a concession, is not unconstitutional as impairing the obligation of a contract.

Henry A. Clover, for plaintiff in error.

Henry Hitchcock, for defendant in error.

Opinion of the court by

WAGNER, J.—The question involved relates to the power of the state to assess, levy, and collect a tax on the property owned by the defendant in error. In 1853 the legislature incorporated the Eliot Seminary, and provided that the incorporators, their associates and successors, should be constituted a body corporate and politic, by the name of the Eliot Seminary, and by that name should have perpetual succession, and be capable of taking and holding by gift, grant, devise, or otherwise, and conveying, leasing, or otherwise disposing of any estate, real, personal, or mixed, annuities, endowments, franchises, and other hereditaments, which might conduce to the support of the said seminary or the promotion of its object; that the property of the said corporation should be exempt from taxation, and the 6th, 7th, and 8th sections of the first article of the act concerning corporations, approved March 19th 1845, should not apply to it: Sess. Acts, 1853, p. 290. The legislature, by an amendatory act in 1857, changed the name of the Eliot Seminary to that of the Washington University: Acts 1857, p. 610.

The 7th section of the General Corporation Law of 1845 provided that the charter of every corporation that should be thereafter granted by the legislature should be subject to alteration, suspension, and repeal, in the discretion of the legislature.

When the law was passed granting the charter, there was no express prohibition restraining the legislature from exempting property from taxation; but by the present constitution it is declared that "no property, real or personal, shall be exempt from taxation, except such as may belong to the United States, to this state, to counties, or to municipal corporations in this state." In pursuance of this clause of the constitution, the legislature passed a law for the assessment and collection of the revenue, by virtue of which the property of the defendant in error was subject to taxation.

It is now insisted that the charter was an irrepealable contract, and perpetually exempted the property of the corporation from taxation. The charter is unusual and of marked peculiarity. There is no preamble to the act, and no limit to its duration, or to the amount of property which it may hold. No obligations are cast upon the corporation; it stipulates for nothing, and agrees to give no consideration whatever for the extraordinary privileges

thus granted. The intention was, we suppose, to establish an institution of learning, but there is nothing to prevent the corporation from accumulating and absorbing millions of wealth, and there is no corresponding obligation imposed to carry out any contemplated object.

To determine correctly this question, it is of the utmost importance that we arrive at a just conclusion in regard to the nature of the act. If it be indeed a contract it must stand, and the state is bound by it, however inexpedient or injudicious it may have been when made. By the Constitution of the United States, no state can pass a law impairing the obligation of contracts. There is no prohibitory clause in the Constitution which has given rise to more protracted litigation and various and profound discussions than the one above quoted. The counsel for the defendant in error has cited numerous adjudged cases from the decisions of the Supreme Court of the United States, and contends that they are conclusive and uncontrollable authority here. If they are upon the same point, and pass on the question presented in this case, they must be considered as decisive, for it appropriately belongs to that tribunal to put a final construction on the national Constitution. It may be advantageous to examine some of the cases on this subject, decided by the Supreme Court of the United States, and compare them with the case we are now considering, that we may ascertain what effect those decisions should have in the present instance.

The first case of this kind which came before that court, and where the subject received a very thorough discussion, was the celebrated one of *Fletcher v. Peck*, 6 Cranch 87. There the legislature of Georgia, by an Act of the 7th of January 1795, authorized the sale of a large tract of wild land, and a grant was made by letters patent, in pursuance of the act, to a number of individuals, under the name of the Georgia Company. Fletcher held a deed from Peck for a part of this land, under a title derived from the patent; by which deed Peck had covenanted that the state of Georgia was lawfully seised when the act was passed, and had a good right to sell, and that the letters patent were lawfully issued, and that the title had not since been legally impaired. The action was for breach of covenant, and the breach assigned was that the letters patent were void, for that the legislature of Georgia, by the Act of the 13th of February 1796,

declared the preceding act to be null and void, as being founded in fraud and corruption. This directly brought before the court the question whether the legislature of Georgia could constitutionally repeal the Act of 1795, and rescind the sale made under it. The court declared that when a law was in its nature a contract, and absolute rights have vested under that contract, a repeal of the law could not divest those rights, nor annihilate or impair the title so acquired. A grant was a contract within the meaning of the Constitution.

The words of the Constitution were construed to comprehend equally executory and executed contracts, for each of them contains obligations which are binding on the parties. A grant is a contract executed, and a party will always be held to be estopped by his own grant. A party cannot pronounce his own deed invalid, whatever cause may be assigned for its invalidity, though that party be the legislature of the state. It was accordingly held that the State of Georgia having parted with the estate of the lands, and that estate having passed into the hands of a *bond fide* purchaser for a valuable consideration, that state was constitutionally disabled from passing any law whereby the estate of the plaintiff could be legally impaired and rendered void. No one could for a moment entertain a doubt about that being a case of contract. The State of Georgia had sold the land for a valuable consideration and conveyed it by deed to the purchaser. The title was actually vested in the grantees, and the contract executed. But had it been only executory it would have been equally obligatory; and had the purchaser agreed at a future day to pay, and the state, in consideration thereof, agreed to convey the lands, there could be very little dispute about its being a contract. The only questions involved in the case were, does the constitutional provision extend to contracts made by states, and has a state, being a party to a contract, a right to declare that contract void for fraud committed by its own government in the execution of that contract, upon the rights of those represented?

The case of *The State of New Jersey v. Wilson*, 7 Cranch 164, is similar to that of *Fletcher v. Peck* in its principles. There, in consideration that the Delaware Indians released to the State of New Jersey their right to certain lands, the legislature declared by law, that the land purchased for the Indians should not be subject to taxation. The Indians subsequently, with the

consent of the legislature, sold the lands they acquired, and the legislature by subsequent enactment imposed a tax on those lands. This was determined by the Supreme Court of the United States to be a violation of the contract made with the Indians, the benefit of which accompanied the title, and therefore void. Chief Justice MARSHALL, in delivering the opinion of the Court, says: "Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extension claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land, with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this Act of Assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The question to be considered was, did the legislature pass the act exempting the lands from taxation as an ordinary law, or was it a contract between the parties. It certainly possessed every element of a contract between parties, making a mutual agreement. But had the Indians parted from nothing, and the legislature enacted simply that their lands should be exempt from taxation, would it have constituted a contract? And could not a subsequent legislature have repealed the statute and imposed a tax upon the lands? I think nothing could be plainer; the legislature cannot by declaring an act perpetual render it so. An act without any consideration passing between the parties providing that lands never should be taxed, would have only the force and effect of an ordinary law, simply exempting them from taxation, which might be repealed by any subsequent legislature."

The case of *Dartmouth College v. Woodward*, 4 Wheat. 518, is a leading case, and is usually cited as containing a most full and elaborate discussion of the principles contended for in this case. In the investigation of the *Dartmouth College* case, the inhibition on the state to impair by law the obligations of contracts received the most thorough and exhaustive examination; and the great influence of the authoritative adjudication then made has remained unimpaired to the present day. Dartmouth College was incorporated by the King of Great Britain in 1769

The Legislature of New Hampshire, by Act of Assembly, undertook to vary the charter in essential points; to institute a number of additional visitors, and in fact to exercise complete control over it. MARSHALL, C. J., declares that the charter was a contract, to which the donors, the trustees of the corporation, and the crown, were the original parties, and it was made on a valuable consideration for the security and disposition of the property.

The act of the state there which was complained of, transferred the whole power of governing the college from the trustees appointed in accordance with the will of the original founder, as expressed in the charter, to the Convention of New Hampshire. The charter was reorganized so as to entirely wrest the corporation from the management and control of the trustees appointed according to the will of the original founders, and converted into a machine wholly subservient to the state government. This, of course, was entirely subversive of the contract under which the donors acquired their property.

In *Gordon v. Appeal Tax Court*, 3 How. 133, it was held that when the legislature of a state accepted from banking corporations a bonus as a consideration for the franchise granted, and pledged the faith of the state not to impose taxes upon them, during the continuance of their charters under the act, that a tax upon the stockholders by reason of their stock, was a violation of the contract, and illegal. The same point was ruled in the cases growing out of the laws of Ohio, creating their banking system.

In 1845 the legislature of Ohio passed a general banking law, the 59th section of which required the officers to make semi-annual dividends, and the 60th required them to set off six per cent. of such dividends for the use of the state, which sum or amount, so set off, should be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. In 1851 an act was passed entitled "An act to tax banks, and bank and other stocks, the same as property is now taxable by the laws of the state." The operation of the latter law was to increase the tax. The Supreme Court of Ohio upheld the law, and declared in favor of its validity, but the Supreme Court of the United States reversed the decision of the state court, on the ground that the first law was a contract founded on a consideration, and that it could not be violated: *Piqua Branch of the State Bank of Ohio v. Knoop*, 16 How. 365; *Dodge v. Woolsey*,

18 How. 331. The Supreme Court of Ohio refused to follow the above decision, and the question was again brought before the national tribunal, where the prior rulings were affirmed, and it was distinctly announced that a state in chartering a corporation might, in express terms, and for a consideration, contract that the corporation should be exempt from taxation, and that a contract so made was protected from the subsequent legislation: *Jefferson Branch Bank v. Skelly*, 1 Black 436.

In all the cases decided by the Supreme Court of the United States, from the very earliest period down to the recent decisions of *Bridge Prop. v. Hoboken*, 1 Wall. 116, and *The Binghamton Bridge*, 3 Id. 52, it is believed a valid consideration was paid in every instance, in which we find judgments of that court invalidating a law of a state intended to abrogate a right vested under a previous statute. The right of taxation, like the right of eminent domain, is a prerogative of sovereignty, and ought never to be surrendered. "That the taxing power is of vital importance," said Chief Justice MARSHALL, in the case of *The Providence Bank v. Billings*, 4 Peters 561-2, "that it is essential to the existence of government are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it, that a consideration sufficiently reliable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." And, again: "The power of legislation, and consequently of taxation, operates on all persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature."

In *Brewster v. Hough*, 10 N. H. 139, the court denies, absolutely, that the state, acting through its legislature, can surrender

any portion of the taxing power. The judge remarks: "The power of taxation is essentially a power of sovereignty or eminent domain; and it may well deserve consideration, whether this power is not inherent in the people, under a republican government, and so far inalienable that no legislature can make a contract by which it can be surrendered without express authority for that purpose in the Constitution, or in some other way leading directly from the people themselves." This case was referred to and received the unqualified assent of Mr. Justice DANIELS, in his dissenting opinion in *The Piqua Branch, &c., v. Knoop*. Prof. GREENLEAF, under the head of "*Franchise*," in his edition of Cruise, notices the case of *Brewster v. Hough*, and observes: "In regard to the position that the grant of the franchise of a ferry bridge, turnpike or railroad, is in its nature exclusive, so that the state cannot interfere with it by the creation of another similar franchise, tending materially to impair its value; it is with great deference submitted that an important distinction should be observed between those powers of government which are essential attributes of sovereignty indispensable to be always preserved in full vigor. Such is the power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses and the like; and those powers which are not thus essential, such as the power to alienate the lands and other property of the state, and to make contracts of service or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist, and necessity requires that they should continue unimpaired. They are intrusted to the legislature to be exercised, not to be bartered away, and it is essential that each legislature should assemble with the same measure of sovereign power which was held by its predecessor. Any act of the legislature disabling itself from the exercise of powers intrusted to it for the public good must be void, being in effect a consent to desert its paramount duty to the whole people: 3 Greenleaf, Cruise, tit. 27, § 29, note.

It is an admitted principle, in our republican governments, that our legislature cannot, in any manner, abridge or lessen the power of a succeeding legislature. Each is alike invested with the general powers of sovereignty. Therefore, one legislature

cannot pass a law irrevocable or irrevocable in its character, unless it has imparted to it something in the nature of a compact or contract, which will presume it inviolate under the institutions of the national Constitution. A law which seeks to deprive the legislature of this inherent and vital principle of sovereignty, the power of taxation, must be so clear, explicit, and determinate, that there can be neither doubt nor controversy about its terms, or the consideration which renders it binding. Every presumption will be made against its surrender, as the power was committed by the people to the government to be exercised and not to be alienated: *The People v. Roper*, 35 N. Y. 629; *Mott et al. v. The Pennsylvania Railroad Co.*, 6 Casey 9; *Commonwealth v. Bird*, 12 Mass. 442.

Because the legislature sees fit to grant certain privileges and immunities to a person, it does not follow that they are to be perpetual, and that the law cannot be repealed. The legislative power may enact that an informer shall have a certain interest in a penalty; yet, after information given, the law may be repealed, and his interest will be destroyed: 10 Wheat. 248; 6 Peters 404. The legislature may, if there is no prohibition in the organic law to the contrary, except certain species of property from taxation, yet they would be at liberty at any time to repeal the exception, and again subject it to the burdens of government. This, however, ought not to be questioned or doubted. But the opinion seems to prevail with some minds that the right of property is more sacred in chartered corporations than the same right is in the person of the citizen; a doctrine which I regard as wholly fallacious and indefensible. It is a notable fact that in earlier days the courts were strongly in favor of corporations, and the reason was obvious: they were few; a strong prejudice existed against them; the legislatures were constantly encroaching upon them, and they required protection. Now, the reverse is true. They have become so numerous and powerful that they overshadow almost everything in the land; nearly every one is some way interested in them, and the legislature needs protection against their exactions, demands, and importunities. Had the grant exempting the property of the defendant in error from taxation been made to an individual in the same terms, I do not think it would be for a moment contended that the grant was not repealable, and that the state did not possess the unquestionable right to resume

the taxing power at pleasure. Can it make any difference because it was made to a corporation? It seems to me that the case of *Christ Church v. Philadelphia*, 24 How. U. S. 300, is entirely similar in principle to the case at bar, and conclusive authority, where it was held that an exemption from taxation contained in the charter of a corporation granted by the state, was in nature *durante bene placito*, and revocable by subsequent act.

It appears, from the report, that in the year 1833 the legislature of Pennsylvania passed an act which recited "that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge; and it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means were curtailed and its usefulness limited," they enacted: "That the real property, including ground-rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to the said hospital, shall be and remain free from taxes."

In the year 1851 the same authority enacted "that all property, real and personal, belonging to any association or incorporated company which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company from which the income or revenue is derived by the owners thereof, shall be hereafter subject to taxation in the same manner and for the same purposes as other property is now by law taxable; and so much of the law as is hereby altered and supplied, be and the same is hereby repealed." It was decided in the Supreme Court of Pennsylvania that the exemption conferred upon the plaintiffs by the Act of 1833 was partially repealed by the Act of 1851; and that an assessment of a portion of the real property under the Act of 1851 was not repugnant to the Constitution of the United States as tending to impair a legislative contract alleged to be contained in the Act of Assembly of 1833. The Supreme Court of the United States says: "The plaintiffs claim that the exemption conceded by the Act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the legislature was spontaneous, and no service or duty or other remunerative condition was imposed on the corporation. It belongs to the class of laws denominated *privilegia*

favorabilia. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence." And it is further added: "It is in the nature of such a privilege as the Act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign." This decision was made by an unanimous bench, subsequent to the Ohio cases, in which three judges dissented, and shows most clearly that a grant of the nature of the one we are now considering was not regarded in the light of a contract.

No importance or weight can be attached to that provision of defendant in error's charter, which excludes it from the operation of the 11th section of the general law in relation to corporations. It is incompetent, as before observed, for one legislature to attempt to derogate from the power, or to tie up the hands of a subsequent legislature. For an irrevocable contract, of the character here presented, no authority or precedent is to be found. Whilst the exemption continued the property was free from taxation, but when the law was repealed it then fell back in the general mass, liable like all other property for the burdens of government. It has been truly said that, "in a representative democracy, the right of taxing the citizen is an inseparable incident of popular sovereignty." And this right must be preserved unimpaired, in order that the revenue and burdens necessary to support the government be not unequally distributed or onerously imposed on any particular class. The rights and obligations of the citizen and the government are mutual and correlative; the one owes the duty of allegiance—the other of protection. Whilst protection is held out and extended, the necessary support for the government must be furnished. Giving away the taxing power in perpetuity inevitably leads to the destruction of the state. If ten millions can be released in one day, one hundred millions may be released in another, and the principle being once established, the process might go on till every resource of revenue was gone. Although the taxing power is but an incidental one, to be exercised as the means of performing governmental functions, it is nevertheless a branch of the legislative power which always, in its nature, implies not only the power of making laws, but of altering and repealing them, as the exigencies of the state and circumstances

of the times may require: Rutherford's Institutes of Natural Law, book 3, ch. 8, § 3.

When the charter of the University was granted, the legislature might have considered it reasonable to foster and encourage it in its infancy, and confer upon it privileges and immunities while struggling into existence. But no provision is made either in express terms, or by reasonable intendment, that those immunities should be perpetual, and have the effect of withdrawing millions of subsequently acquired property from taxation.

In 1853 taxes were light, and the state debt was small, and exceptions could be made without great detriment. After that period the state embarked in a false and ruinous system of loaning its credit to corporations, by which she incurred an immense debt; then followed the civil war which increased her already burdensome obligations, and taxation became exceedingly onerous.

In this condition of things it was deemed the part of wisdom to make all property within the jurisdiction of the state, receiving the benefit of her law and protection, share the common burthens.

This was entirely a matter resting in the sound discretion of the legislative branch of the government, and we have been unable to find any objection to their exercise of the power.

The other judges concurred.

Judgment reversed, and petition dismissed.

The legislature of a state has no power to impair the obligation of contracts. It has no power to divest the state by contract, or otherwise, of the sovereign right to tax property within its jurisdiction.

Why cannot these two propositions stand together?

The second one is not in conflict with the first. It simply negatives the right, in a legislature, to make any of the attributes of sovereignty the subject of contract or barter. They are inherent in the state, and necessary conditions of its existence. Every one is bound to know this, and therefore no one can be deceived in acting upon the faith of a contract, which assumes to make the sale of these attributes the subject-matter of its terms.

Unfortunately the Supreme Court of the United States has taken a different

view of the question. In *Gordon v. Appeal Tax Court*, 3 How. 133; *Piquet Branch of the State of Ohio v. Knoop*, 10 How. 369; *Dodge v. Woolsey*, 18 How. 331; and *Jefferson Branch Bank v. Skelly*, 1 Black U. S. 436, that learned tribunal has settled down upon a series of decisions, which it would be difficult upon any well defined principle to sustain. It seems to be conceded in these decisions, that a legislature would not have the power to divest the state of its sovereign right of taxation as to all the property within its jurisdiction; while a surrender of that right as to a portion of such property is repeatedly approved. The extent to which such surrender may be carried, is not indicated, nor is it possible to perceive any limit which could afford the basis of a rule for the judiciary,

short of a total denial of the power. It is on this account we are inclined to say, that the question is not settled upon principle. It hangs between a *total* and a *partial* surrender of an essential attribute of sovereignty, withholding the former and conceding the latter. By adopting an unqualified denial of this right of surrender in all cases, we would find the question settled upon principle, and all litigation and doubt upon the subject would be at an end.

As it now stands, litigation will have to go on in restless obedience to a series of decisions which have nothing but their authority to commend them to the state courts. Cases will continually rise, in which the right to exempt from taxation will be contested; and in the differing facts of each case, will be sought some distinguishing element, by which to escape the authority of the Federal decisions.

In the present case, the court, while evidently yielding reluctant assent to their authority in establishing the doctrine that a state may part with its sovereign right of taxation, maintains a distinction which must commend itself to every mind. That distinction rests upon the fact that the grant of exemption from taxation in this case was without consideration, and therefore fell within the class of privileges, which could be withdrawn at any time. As an executory

obligation, the consideration upon which it rested was too shadowy to support the conclusion that it was to be continued against the sovereign will.

Yet it may be doubted whether the consideration implied in this charter would not have been sufficient to support the grant or concession of anything else but an attribute of sovereignty. It is true the right of taxation is the subject of grant or surrender under the Federal decisions, but not exactly in the same manner as land and money. • The contract of surrender must be clear in every element requisite to its existence. Neither the consideration nor obligation can be left to implications.

The charter in this case was singularly defective in failing to disclose the essential elements of a contract. No consideration was expressed. There is no return for the grant—no corresponding obligation on the part of the university to devote its funds and franchises to the cause of education, except what is implied in the word “seminary.”

All who are inclined to the view that a legislature has no power, even for a sufficient consideration, to part with the right of taxation, will yield a cheerful assent to the distinction maintained in this case, where the consideration for the surrender is found, if at all, in doubtful and uncertain implications.

A. M.

Supreme Court of the United States.

RICHARD MASON, PLAINTIFF, v. ANSON ELDRED AND OTHERS.

Under the general issue in *assumpsit*, evidence is admissible to show that the alleged cause of action did not exist at the commencement of the action.

A note given by partners is not a joint and several obligation in a technical sense, though it has some of the qualities of a several obligation.

Therefore a judgment upon a partnership note against one of the makers is at

common law a bar to a subsequent suit against the other partner who had not been served with process in the first suit.

But in Michigan the rule is otherwise by statute.

The case of *Sheehy v. Mandeville et al.*, 6 Cranch 254, criticised and dissented from.

The opinion of the Court was delivered by

FIELD, J.—This case comes before us on a certificate of division of opinion between the judges of the Circuit Court of the District of Wisconsin. The action is *assumpsit* upon the promissory note of the defendants, made by them as partners. Process was served upon the defendant, Anson Eldred, who appeared and pleaded the general issue. Neither of the other defendants was served with process, or appeared to the action. On the trial the plaintiff produced and read in evidence the note without objection, and rested. The defendant served, then produced, and offered to read in evidence, an exemplification of a record of a judgment recovered by the plaintiff upon the same note in an action against the same defendants in a court of the State of Michigan. The judgment was, in form, against all of the defendants, but the record showed that the process in the action had been served only on one of them, Elisha Eldred. To the introduction of this record objection was made, upon which the question arose whether the record was admissible in evidence under the issue, in bar of the plaintiffs' recovery against Anson Eldred. Upon this question the judges were opposed in opinion.

The counsel of the plaintiff suggests that the question thus presented is divisible into two parts: 1st. Whether the record was admissible under the pleadings; and, 2d. Whether, if admissible, the judgment constituted a bar to the present action. We think, however, that the admissibility of the record depends upon the operation of the judgment. If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissible, for it has long been settled that under the plea of the general issue in *assumpsit* evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit: *Young v. Black*, 7 Cranch 565; *Young v. Rummell*, 2 Hill 480. On the other hand, if the note is not thus merged, it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question then for determination relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the Joint-Debtor Act of Michigan.

It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought, were made jointly with another and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner.

The language of Lord MANSFIELD, in giving the judgment of the King's Bench in *Rice v. Shute*, Burr. 2511, "that all contracts with partners are joint and several, and every partner is liable to pay the whole," must be read in connection with the facts of the case, and when thus read does not warrant the conclusion that the court intended to hold a copartnership contract

the several contract of each copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several, that in a suit against him judgment would pass for the whole demand, if the non-joinder of his copartners was not pleaded in abatement.

The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of *Sheehy v. Mandeville and Jamesson*, decided by this court, and reported in 6 Cranch 254. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant, Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted, and its authority disregarded in numerous instances by the highest tribunals of different states. It was elaborately reviewed by the Supreme Court of New York in the case of *Robertson v. Smith*, 18 Johns. 459, where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the Supreme Court of Massachusetts a ruling similar to that of *Robertson v. Smith* was made: *Ward v. Johnson*, 13 Mass. 148. In *Wann v. McNulty*, 2 Gilman 859, the Supreme Court of Illinois commented upon the case of *Sheehy v. Mandeville*, and declined to follow it as authority. The court observed that notwithstanding the respect which it felt for the opinions of the Supreme Court of the United States, it was well satisfied that the rule adopted by the several state courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law, and was supported by better reasons.

In *Smith v. Black*, 9 S. & R. 142, the Supreme Court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless, indeed, where the cause of action is joint and several, which, certainly, actions against partners are not."

In its opinion the court referred to *Sheehy v. Mandeville*, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the Supreme Court of the United States, was not of binding authority, and it was disregarded.

In *King v. Hoar*, 13 M. & W. 495, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other, was presented to the Court of Exchequer, and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that, by the judgment recovered, the original demand had passed *in rem judicatam*, and could not be made the subject of another action. In the course of the argument the case of *Sheehy v. Mandeville* was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice MARSHALL, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice STORY, in *Trafton v. The United States*, 3 Story 651, refers to this case in the Exchequer, and to that of *Sheehy v. Mandeville*, and observes that in the first case the Court of Exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the

judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common-law rule were to govern the decision of this case, we should feel obliged, notwithstanding *Sheehy v. Mandeville*, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action. But, by a statute of that state, the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence." Compiled Laws of Michigan of 1857, vol. II., chap. 133, p. 1219.

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them, personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded: *D'Arcy v. Ketchum*, 1 How. 165. Nor is the demand against the parties not sued merged in the judgment against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them; it shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power

of the state to limit the operation of the judgment thus recovered. The state can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand, as it can modify the operation of the judgment in any other particular.

A similar statute exists in the state of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterwards before the court, if found within the state, that such parties may be sued upon the original demand.

In *Bonesteel v. Todd*, 9 Michigan 379, an action of covenant was brought against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his co-defendant under the Joint Debtor Act of New York, process in that state having been served upon his co-defendant alone. The court below held the judgment to be a bar to the action. On error to the Supreme Court of the state this ruling was held to be erroneous. After referring to decisions in New York, the Court said, "no one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And, inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment, or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued."

In *Oakley v. Aspinwall*, 4 Comstock 513, the Court of Appeals of New York had occasion to consider the effect of a judgment recovered under the Joint Debtor Act of that state upon the original demand. Mr. Justice BRONSON, speaking for the court, says: "It is said that the original demand was merged in and extinguished by the judgment, and consequently that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the

original action. But the Joint Debtor Act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course: it can work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action, which is, in truth, no cause of action at all, and then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that state, we answer the question presented in the certificate, that the exemplification of the record of the judgment recovered against the defendant, Elisha Eldred, offered by the defendant, Anson Eldred, is not admissible in evidence in bar of, and to defeat, a remedy against him.

Supreme Court of the United States.

THE GALENA, &c., PACKET COMPANY v. SO MUCH OF THE ROCK ISLAND RAILROAD BRIDGE AS LIES WITHIN THE NORTHERN DISTRICT OF ILLINOIS, THE ROCK ISLAND RAILROAD COMPANY, THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY, CLAIMANTS.

A maritime lien does not exist upon a stationary structure like a bridge, and therefore a Court of Admiralty has no jurisdiction of a proceeding *in rem* against a bridge to recover damages caused by the structure to vessels navigating a public stream.

Nature and extent of the admiralty jurisdiction *in rem* discussed by FIELD, J.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Robert Rae and *A. W. Arrington*, for libellants.

C. Beckwith and *B. C. Cook*, for claimants.

The opinion of the court was delivered by

FIELD, J.—The libel in this case is filed against that part of the Rock Island Railroad Bridge, which is situated in the Northern District of Illinois, for alleged damages done by that

part of the bridge to two steamboats, the property of the libellant, employed in the navigation of the Mississippi river. It alleges that, by law and the public treaties of the United States, the Mississippi river is, for the distance of 2000 miles, a public navigable stream and common highway, free and open to all the citizens of the United States, who are entitled to navigate the same by sailing and steam vessels, and otherwise, without impediment or obstruction; that the Rock Island bridge obstructs the free navigation of the stream; and that by collision with this obstruction the steam-vessels of the libellant have been injured, and he has in consequence been damaged to an extent exceeding \$70,000.

In accordance with the prayer of the libel, process was issued and the property attached. The Mississippi and Missouri Railroad Company and others then intervened as claimants, and filed an exception to the jurisdiction of the court to proceed against the property in question in the manner "in which the same is sought to be proceeded against by the libel"—in other words, they objected to the jurisdiction of the court to take a proceeding *in rem* against the property. The exception was sustained by the District and Circuit Courts, and the libel dismissed. The correctness of this ruling is the sole question presented for our determination.

There is no doubt, as stated by the counsel for the appellant, that the jurisdiction of the Admiralty extends to all cases of tort committed on the high seas, and in this country on navigable waters. For the redress of these torts, the Courts of Admiralty may proceed in *personam*, and when the cause of the injury is the subject of a maritime lien, may also proceed *in rem*. The latter proceeding is the remedy afforded for the enforcement of liens of that character.

A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing, upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages: and when the lien arises from torts committed at sea, it travels with the thing, wherever that goes, and into whosoever hands it may pass. The only object of the proceeding *in rem* is to make this right, where

it exists, available—to carry it into effect. It subserves no other purpose.

The lien and the proceeding *in rem* are therefore correlative—where one exists the other can be taken, and not otherwise. Such is the language of the Privy Council in the decision of the case of *The Bold Buccleugh*, 7 Moore 284. “A maritime lien,” says that court, “is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process.”

There is an expression in the case of *The Volant*, 1 W. Rob. 38, attributed to Dr. LUSHINGTON, which militates against this view. He is reported to have said, that the damage committed on the high seas confers no lien upon the ship, and this is cited by the counsel of the appellant to show that a maritime lien is not the foundation of a proceeding *in rem*. But the expression is a mere dictum, and the Privy Council in the case cited allude to it, and observe that it is doubtful, from a contemporaneous report of the same case (1 Notes of Cases 508), whether the learned judge made use of it, and add, that if he did, the expression is certainly inaccurate, and not being necessary for the decision of the case, cannot be taken as authority.

A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime lien.

Decree affirmed.

Supreme Court of Pennsylvania.

WILLIAM A. RHODES ET AL. v. ELON DUNBAR ET AL.

The objection to a factory or other building in a city that it will prevent the use of the neighboring ground for such buildings as would, in the ordinary course of affairs and the extension of the city, be erected there, is not a ground for interference by a court of equity. The subject presented by such objection is one of public policy, not of private right, with which courts deal.

A court of equity will not interfere with a particular use of a building or lot of ground unless it amounts to a nuisance at law for which damages might be recovered, and for which damages merely would not be an adequate remedy.

Mere diminution of value of surrounding property is not a ground for injunction.

Smoke, noise, and liability to fire as elements of nuisance in a city, discussed by THOMPSON, C. J.

BILL in equity to enjoin the erection of a planing-mill. Injunction granted at *Nisi Prius*, whereupon respondents appealed.

The opinion of the Court was delivered by

THOMPSON, C. J.—The plaintiffs, by their bill, seek to enjoin the defendants from re-erecting or reconstructing a planing-mill, late the property of John D. Jones, situated on the east side of Twenty-first street, between Chestnut and Market streets, which was destroyed by fire in the month of May 1867. It is claimed that if re-erected, it will be a nuisance to the property and dwellings of the complainants, impairing their value, and rendering the enjoyment of them uncomfortable and unsafe; and this, it is alleged, will flow from three causes, incidents to the structure and its intended use, if it be permitted to go into operation, viz.: 1st. Smoke, soot, and dust. 2d. Noise. And 3d. Danger from fire. The general averment in the bill—that the mode in which such a factory or mill is worked renders it unsuited to a neighborhood closely built up, and especially to one occupied by handsome buildings used as residences, and will be calculated to prevent the use of the neighboring ground “for such buildings as would in the ordinary course of affairs, and the extension of the city in that direction, be put up”—presents for consideration a subject not within our sphere of judicial action. It presents a question of policy, whether a part or portion of a city is or ought to be devoted exclusively to private residences or other special objects, and that is manifestly for the local authorities or the legislature to determine, and not us. That concerns alone the

public, and not private parties. With people's *rights* we deal in cases like the present, and not with questions of mere policy, local or general.

No one will, for a moment, doubt that we are invested with ample powers to restrain the erection of any building or structure intended for a purpose which will be a nuisance *per se*; such as bone-boiling, horse-boiling establishments, swine-yards or pigsties, and other various like establishments. These not only interfere with the health, but if they do not reach to that, they do to the usual and ordinary enjoyment of the residences of inhabitants coming within the circle of atmosphere tainted by them, and both property and persons may be prejudiced or injured thereby. The right to claim that such establishments shall be prevented is the right that every citizen has to pure and wholesome air, at least as pure as it may be consistent with the compact nature of the community in which he lives. The rule is the same in regard to noises which disturb rest and prevent sleep. There are innumerable cases of injunction for such nuisances.

But does the case in hand come within the classes to which reference has been made, in either of the specifications mentioned?

1st. The smoke and soot complained of, I do not think have been shown to have been a nuisance in the old mill for which damages at law might have been recovered; and I know of no other criterion where the complaint is for injury to property and its enjoyment. Irreparable injury is the foundation for intervention by injunction. Not irreparable because so small that it may not be estimated, but because likely to be so great as to be incapable of compensation in damages: Hilliard on Inj. 270, 271 and 272; 37 N. H. Rep. 254. There must be injury and damage both, to justify the remedy by injunction: *Campbell v. Scott*, 11 Sim. 39. The complaint of the old mill, in this particular, was on account mainly of the fuel, chips, shavings, and saw-dust used; and that is the foundation of the complaint against the contemplated re-erection. If no other species of fuel would answer the purpose, or could be used, I grant there might be more in the point. But this is not pretended. If, therefore, when the mill shall be put into operation, and by its use it becomes a nuisance from this cause, the remedy is easy and well known. Equity will enjoin against the use of such fuel, and the mischief will be at once cured. That a thing may possibly work injury

to somebody is no ground for injunction. If the injury be doubtful, eventual, or contingent, equity will not interfere by injunction: *Butler v. Rogers*, 1 Stock. (N. J.) 487; Hilliard 271. This might be sufficient on this point, but it is quite possible that in the construction of chimneys all objection to this kind of fuel may be obviated. The answer of one of the defendants asserts this, and that it is so intended, and can be accomplished, and it is nowhere controverted. Indeed, it seems evident that if the chimneys be high enough, with proper netting at the top, that anything like annoyance amounting to a "sensible injury" to property, as was held to be essential to enjoining in *Tipping v. St. Helens Smelt. Co.*, 5 Am. Law Reg. N. S. 104, 116 E. C. L. R. 608, may be entirely avoided. Indeed, the learned master seemed in doubt whether the element of smoke, soot and cinders, judged of by the old mill, proved or would prove a material injury to property. Alluding to these agencies, he says they "perhaps cannot, in a strict sense, be said to have produced a material—that is a palpable, direct, physical—injury to the plaintiff's property." But then he gives reasons to show that it occasioned annoyance and discomfort, and, therefore, concluded that a re-erection of the mill ought to be prevented for this and other reasons. Annoyances without damage, I have already said, are no grounds for injunction. Shall the owner of property be deprived of its free and profitable use altogether, it may be, because the light and air may not be as pure as a neighbor might desire, or because a laundress may not be able to dry the contents of the wash-tub quite as satisfactorily?—or a house-maid have to dust more frequently? These are annoyances referred to in the proof, but are incident to a city residence; and if people prefer living in a city, they can only do so on account of others desiring to do the same thing in sufficient numbers to constitute a city, and then each tacitly undertakes to suffer such annoyances or inconveniences as are incident to that kind of community. This has been often expressed, but is strikingly enforced by Lord Ch. WESTBURY, in *Tipping v. St. Helens Smelt. Co.*, *supra*:—"If a man," said the Chancellor, "live in a town, of necessity he should submit himself to the consequences of the obligations of trades which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town. If a man live in

a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground of complaint because to himself, individually, there may arise much discomfort from the trade carried on in that shop." Lord CRANWORTH, in the same case, puts it thus:—"You must look at it, not with a view to the question whether abstractly that quantity of smoke was a nuisance, but whether it was a nuisance to the person living in the town." We endeavored to express something like this in *Sparhawk v. Union Passenger Railway*, 4 P. F. Smith 401. It must be apparent to all, we think, in regard to the intended structure, that the circumstances here do not establish a nuisance *per se*; and if it ever amounts to that from the causes alleged in regard to the fuel, it is within the powers of the Court to redress any injury by restraining the use of the objectionable fuel. It may be that none such may be used, or, if used, that there may be an adaptation of structure to prevent injurious consequences and annoyances. Neither the facts nor precedent would, we think, justify us in restraining the re-erection of the building on this ground. We are, therefore, constrained to differ from our brother, who sustained the Master on this point, as well as on another, at *Nisi Prius*.

2d. Noise.—It is enough to say here that the Master was of opinion, and so found, that this "was not sufficiently established to afford a ground of relief to the plaintiffs." This conclusion was not much controverted in the argument before us, and we think the Master was right in his conclusions on this point.

3d. Danger, or apprehension of danger, from fire, is the last point to be noticed, and this seems to have been really the main ground of decision in the mind of the Master, as well as of our learned brother, in awarding an injunction.

What is apprehension? It is anticipation of danger, not a certainty that it will occur. It may be felt as well when danger is infinitely remote as when it is near; as well when it may never occur as when it may. It is, in regard to fire, "speculative, eventual, and contingent," and the books say this is never a ground for interference by injunction: *Earl of Ripon v. Hobert*, 3 Mylne & Keene 169. The apprehension of danger must on the theory of this case, at least, be very remote, viz: that the mill when erected may take fire by negligence, accident, or by the work of

an incendiary ; that the fire may not be extinguished, and that it may be communicated to and burn the property of the plaintiffs and endanger their lives. Every element in all this is "speculative, contingent, and eventual." The mill might take fire, but the flames may be extinguished. It might be burned down without destroying the property of anybody else. It would be a waste of time, I think, to labor to prove what every one must assent to—that this, as a ground to exercise the power to prevent the occupation and enjoyment of property—would be extremely intangible, and once established as to this kind of mill, might be applied to every other building or business in the community, described in fire risks, or known as extra hazardous, and not only planing-mills, but chemical laboratories, carpenter-shops, cotton-mills, barns, stables, in short, everything that there might be ground to apprehend danger of fire from, would gradually fall into the vortex of chancery power, and might be banished the city altogether, to the great inconvenience of the people. There is danger in all such establishments, it is true, and the same argument would apply to many others. The degree of danger would be the only difference.

In *Anonymous*, 3 Atk. 750, Lord HARDWICKE said: "Bills to restrain nuisances must extend only to such as are *nuisances at law*, and the *fears of mankind, though they be reasonable*, will not create a nuisance." That rule was held and acquiesced in in the case of *Carpenter v. Cummings*, 3 Phila. Rep. 74. That was a bill to restrain the defendant from maintaining a boiler to propel steam machinery under the pavement of a public street and thoroughfare. The nuisance charged was the fear of danger to the complainant and others, that it might explode and destroy their property and lives. The injunction was refused, on the authority of the case mentioned above, citing also 18 Ves. 219, and was, it would appear, acquiesced in by the parties and counsel. *Butler v. Rogers*, 1 Stockt. 487, was an attempt to restrain a blacksmith shop. WILLIAMSON, Ch., said: "as a general rule the Court ought not to interfere in cases of nuisances, where the injury apprehended is of a character to justify conflicting opinions, whether the injury will, in fact, be ever realized."

If it be true that the act complained of must be a nuisance at law, as held in 3 Atk. 750, *supra*, and sanctioned in *Sparhawk v. The Union Passenger Railway Company*, *supra*, this test would

settle the controversy in this case at once. No action can be found, I think, in which mere apprehension of fire from the use of property by one has been held a ground to recover damages by another on the possibility that it might be communicated by the former to the property of the latter.

But it is said that the rate of insurance upon the plaintiff's property will be increased as a consequence of the re-erection of this mill. If this fact had been found by the Master, it would not have established the point of nuisance. It is well known that the existence of extra hazardous property in a neighborhood, while it draws upon itself a heavier burden or rate of insurance, does not usually involve special rates, in regard to proximate property belonging to a class with fixed rates. But it is stated very distinctly in Story's Equity Jurisprudence, sec. 925, that mere diminution in the value of property, without irreparable mischief, will not furnish any foundation for equitable relief.

In *Attorney-General v. Nichols*, 16 Ves. 337, which was an application for an injunction against darkening ancient lights, Lord ELDON said: "The foundation of this jurisdiction, interfering by injunction, is that head of mischief alluded to by Lord HARDWICKE (*Fishmongers' Company v. East India Company*, 1 Dick. 164), that sort of material injury to the comfort of the existence of those who dwell in the neighboring house, requiring the application of a power to prevent, as well as to remedy an evil for which damages more or less would be given in an action at law.

* * * * I repeat the observation of Lord HARDWICKE, that the diminution of the value of the premises is not a ground." That is to say, the mere diminution, irrespective of any direct damage, is not a ground for injunction. On this principle, the diminution by reason of increase of insurance, if it really exists, is no ground for the interference sought.

Grant that the species of property in question is extra hazardous, is subject to fires: this on the authority of all the cases would not render it a nuisance. It does not necessarily affect health or comfort in the ordinary uses and enjoyments of property in the neighborhood. If the business be lawful and carried on reasonably, and does not interfere in either of these ways with the rights of others, it cannot be a nuisance in fact or in anticipation, and in my opinion we have no authority whatever to interfere with it.

These observations give no just grounds to draw the inference that a powder magazine or depot of nitro-glycerine, or other like explosive materials, might not possibly be enjoined, even if not prohibited, as they usually are, by ordinance or law. It is not on the ground alone of their liability to fire, primarily, or even secondarily, that they may possibly be dealt with as nuisances, but on account of their liability to explosion by contact with the smallest spark of fire, and the utter impossibility to guard against the consequences or set bounds to the injury, which, being instantaneous, extends alike to property and person within its reach. The destructiveness of these agents results from the irrepressible gases once set in motion, infinitely more than from fires which might ensue as a consequence. Persons and property in the neighborhood of a burning building, let it burn ever so fiercely, in most cases, have a chance of escaping injury. Not so when explosive forces instantly prostrate everything near them, as in the instances of powder, nitro-glycerine, and other chemicals of an explosive or intensely inflammable nature.

It is a difficult matter at all times to strike the true medium between the conflicting interests and tastes of people in a densely populated city. It requires the merchant, mechanic, manufacturer, baker, butcher and laborer, as well as the wealthy employed or unemployed citizen, to constitute a city. They all have rights, and the only requirement of the law is, that each shall so exercise and enjoy them as to do no injury in that enjoyment, to others, or the rights of others, in the sense in which the law regards injury, namely: accompanied by damage. It might be a great injury to the defendants in this case to restrain them from the enjoyment of their property, without being of any benefit to the plaintiffs. The ground claimed in argument to sustain the decree in this case was mainly the danger of fire. The proof is that these are dangerous establishments by comparison with others less dangerous—but there is proof that they do not always burn, and may never burn. In this state of the case, the language of Lord BROUGHAM, in the *Earl of Ripon v. Hobert*, is worth a reference here. "It is also," said his Lordship, "very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the intervention by injunction, in the case of what we have been regarding as *eventual* or *contingent* nuisances." We have said enough to indicate our opinion

that the fear of fire is of this description, and that this injunction should not have been granted originally, and therefore that the decree must be reversed and bill dismissed.

Decree reversed and bill dismissed at the costs of the appellees.

United States District Court, District of New Jersey.

MATTER OF THE JERSEY CITY WINDOW GLASS COMPANY.

A stopping of payment of his commercial paper by a merchant or banker, in order to constitute an act of bankruptcy under sect. 39 of the Bankrupt Act, must be both fraudulent at first and be continued for fourteen days.

But a stoppage continued for fourteen days is *prima facie* fraudulent, and casts on the debtor the burden of proving his solvency and that his stoppage will not have the effect of defrauding any creditor.

A petitioning creditor, in proceedings for involuntary bankruptcy, not having alleged that the debtor's stoppage for fourteen days was fraudulent, was allowed to amend his petition by adding that allegation.

THIS was a petition by Richard B. Wigton, to have the Jersey City Window Glass Company adjudged bankrupt.

J. F. Randolph, for the creditors.

J. Dixon, for the company.

The opinion of the court was delivered by

FIELD, J.—The only act of bankruptcy alleged in the petition is, that the Jersey City Window Glass Company suspended payment of their commercial paper, and did not resume within a period of fourteen days. There is no allegation that this suspension and non-resumption were fraudulent. This, it is contended, is an act of bankruptcy within the meaning of the 39th section of the Bankrupt Act. I am aware that this construction has been sanctioned and adopted by the judges of several of the District Courts. My attention has been more than once called to the opinion of Judge HALL, of the Northern District of New York: *Matter of Wells & Son*, ante 163; but with all my respect for his learning and ability, I have never been able to bring my mind to the conclusion which he has reached. The language of the clause under consideration is: "Who, being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed

payment of his commercial paper within a period of fourteen days." It is insisted that here are two distinct acts of bankruptcy created and described; the first, a fraudulent stopping, which is in itself an act of bankruptcy, and upon which proceedings may at once be instituted; and the second, a mere suspension of payment, without any fraud, and which only becomes an act of bankruptcy by being continued for a period of fourteen days.

It is possible, I admit, to read this clause in such a way as to make it seem to bear such a construction. But it can only be done by making a distinct pause after the word "stopped," and then reading in one breath the remaining part of the sentence. But is that the way in which any one would ever think of reading it? Is it the natural and ordinary way? Would not such a construction, to say the least, be a strained one? Would it not be doing violence to the language, and wresting it from its obvious sense and meaning? And would it not make the whole sentence not only a very awkward, but a very ungrammatical one? In this respect, it would be in striking contrast with the rest of the act, in which, as it seems to me, much more attention has been paid to clearness of expression, the correct use of language, and the rules of grammar, than is usual in acts either of our national or state legislatures. But why depart from the plain and obvious meaning of the language employed, and resort to a construction so forced and unnatural? For the purpose, it is said, of carrying out the general intentions of Congress in the passage of the Bankrupt Law. Now, it is very well known that this law is in a great measure based upon the English statutes of bankruptcy. Almost every act of bankruptcy enumerated in the 39th section, is to be found in the English statutes, where they are described in substantially the same terms. If, then, the fraudulent stopping of payment by a banker, merchant, or trader of his commercial paper, and the suspension without fraud for a period of fourteen days were two distinct and well-known acts of bankruptcy under the English law, we might naturally expect to find them in our own act, and might very well imagine that we had found them in the clause referred to, although certainly not very clearly expressed. But it so happens that there are no such acts of bankruptcy known in the English law. It is true, that by their bankrupt acts the suspension of payment by a debtor is resolved into an act of bankruptcy, by summoning

him before the Court of Bankruptcy, and if such debt is not paid or arranged to the satisfaction of the creditor within a prescribed time, such non-payment or non-arrangement constitutes an act of bankruptcy. But a fraudulent stopping alone, whether followed by a resumption or not, is an act of bankruptcy never before heard of. If, therefore, it was intended by the framers of our act to make this for the first time an act of bankruptcy, it might be presumed that they would have declared their intention in clear and unmistakable language. Certain it is, that we ought not to wrest their language from its plain and obvious meaning in order to infer that they had any such intention.

But what is meant by a fraudulent stopping? Does it mean that the debtor is unable to pay; that he is insolvent? If so, he ought to stop. He has no right, under those circumstances, to pay one creditor to the exclusion of another. This of itself would be an act of bankruptcy. It must mean, therefore, if it means anything, an unwillingness to pay, although he has the means of doing so. But suppose he pays the day after his commercial paper arrives at maturity, would not that negative the idea of fraud? Must we not wait, therefore, to see whether payment is resumed within a reasonable time, before we pronounce the original suspension to be fraudulent? Undoubtedly the stopping payment might be accompanied by circumstances which would clearly indicate a fraudulent purpose; such, for instance, as the concealment or removal of property, or the fraudulent sale or conveyance of it. But these would be in themselves independent acts of bankruptcy, upon which proceedings might be instituted. But how the mere act of suspension, if followed by resumption within a few days, could be deemed fraudulent I do not very well see. I do not believe, therefore, it was the intention of Congress to make the stopping of payment, under any circumstances, an act of bankruptcy in itself, and without reference to resumption. If the debtor is perfectly solvent, and if he resumes payment within the fourteen days, so that no one is defrauded, why should he be adjudged a bankrupt?

What, then, is the true meaning and intent of the clause in question? I understand it to mean, according to the obvious sense of the language made use of, that when a banker, merchant, or trader fraudulently stops or suspends payment of his commercial paper, and does not resume within fourteen days, he commits

an act of bankruptcy. To constitute the act, there must be a stopping or suspension of payment, and also a non-resumption within fourteen days, and such suspension and non-resumption must be fraudulent in the sense in which that term is here employed. If the debtor is able to pay, if he has the means of paying, and does not do so, then undoubtedly he commits a fraud upon the creditor who holds his paper. And if he is unable to pay, if he is insolvent, then he commits a fraud upon his other creditors, by not having himself declared a bankrupt, and making a surrender of his property to be equally distributed among them.

It will be seen that this act of bankruptcy is confined to bankers, merchants, and traders, and that it extends only to the non-payment of commercial paper, that is, to negotiable securities, to bills of exchange, and promissory notes. These are securities of a peculiar kind, well known to the law, and held in high respect. There is an especial dishonor attached to their non-payment; there is a sort of commercial sanctity about them. They are intended to pass from hand to hand; they are valuable instruments of commerce; they perform many of the functions of money. If, therefore, a banker, merchant, or trader suffers paper of this description to be dishonored, and does not resume payment within fourteen days, it argues such a state of insolvency upon his part as to make it a fraud upon his creditors not to surrender his property for equal distribution among them. Such a suspension and non-resumption may well be termed fraudulent. I do not mean to say that it would be conclusive evidence of fraud, but it would certainly be *prima facie* evidence, and it would cast upon the debtor the burden of proving that he was perfectly solvent, and that such suspension and non-resumption would not have the effect of defrauding either the holders of his dishonored paper, or any of his other creditors.

Such a construction of the clause in question makes the whole consistent and intelligible, and would render it somewhat analogous to that provision of the English Bankrupt Law, to which I have adverted.

It would be difficult to imagine any case better calculated than the one now before the court, to illustrate the justice and propriety of such a provision. It is alleged on the part of the creditor and not denied by the counsel of the company, that they have issued a series of promissory notes, falling due at successive

periods, and that they are utterly unable to pay them. It is admitted also, that they had it in contemplation to apply by their petition to be declared bankrupts, but that upon taking the advice of counsel they concluded not to do so. Now, it would be a serious defect in our Bankrupt Act, if no provision were made by which the creditors of such a company could compel them to surrender all their estate and effects for the benefit of their creditors, without proving any other facts than their continued suspension and utter insolvency. If, therefore, it had been alleged in this case that such suspension and non-resumption within fourteen days were fraudulent, I should have had no hesitation in declaring it to be an act of bankruptcy.

I see no objection, however, to allowing the petition to be amended by the insertion of that word.

United States District Court—District of Massachusetts.

IN THE MATTER OF DANIEL P. KINGSLEY, A BANKRUPT.

A debt barred by the Statute of Limitations of the state where the bankrupt resides cannot be proved against the estate in bankruptcy.

The entry of a debt upon the schedule by a bankrupt is not such an acknowledgment or new promise as will revive the debt.

LOWELL, J.—The questions certified and argued in this case are, whether a debt which is barred by the Statute of Limitations of Massachusetts, where the bankrupt has resided for the last ten years, and where these proceedings are had, but not barred by the Statute of Limitations of Vermont, where the creditors reside, and where both parties resided when the contracts were made, can be proved against his estate in bankruptcy. If not, whether the act of the bankrupt in entering the debt upon his schedule is such an acknowledgment or new promise as will revive it.

To the first question it would seem to be a sufficient reply that the Statute of Limitations would bar a suit in any court of law in this district, and especially in the Circuit Court of the United States. For courts in bankruptcy in disputed cases must refer such questions to the other courts, or at least must decide them upon the same principles as other courts would. Thus, by our

statutes of bankruptcy, all such disputes may be tried, either by prosecuting to final judgment any suit already pending, or where the dispute first arises after the proceedings have been begun, by trying it according to the course of the Circuit Court in actions at law. I cannot resist the conclusion that any plea which would be good at law (this being a legal debt), must be good in bankruptcy.

But as the question has been decided otherwise by a judge from whom I differ, with great hesitation (*Matter of Kay*, ante, p. 283), and has been argued here at great length, I will proceed to show why, in my judgment, the same result ought to follow upon principle and authority, even if the mere fact that the defence is good at law were not, as I think it is, absolutely binding and decisive.

Statutes of Limitations are remedial and beneficial. They are founded upon the sound principle that lapse of time, by obscuring the truth, renders the administration of justice uncertain, and that for the sake of justice as well as peace, payment ought to be presumed after a certain period has passed. If the evidence of debt be of a high and formal nature, the evidence of payment may be expected to be more formally made and preserved with more care than in mere simple contracts, but even in such cases, some period works a bar. It is not a presumption of fact which may be rebutted by proof of non-payment, but a conclusive presumption of law: 1 Greenl. Ev. § 16. So useful and important have these statutes been found, that the courts of equity, when not strictly bound by them, have adopted them as binding rules, and they are so regarded by the Circuit Court of the United States sitting in equity. If there were a discretion vested in the courts of bankruptcy to adopt a new rule, it seems to me they would follow this analogy.

The point was decided in this way by Lord ELDON, in *Ex parte Dewdney*, 15 Ves. 479, and afterwards reheard and reviewed by the same learned judge, when he said that his first opinion was strongly confirmed, and that he had additional reasons for it. But those he does not appear to have recorded, though he intended to do so: see note (a) to 2 Rose 59; *Ex parte Roffey*, 19 Ves. 468. The reasons which he has given are simple and have been accepted in England, and his decision, though opposed to a ruling of Lord MANSFIELD at *Nisi Prius* and to the practice of some of the ablest commissioners of bankrupts, has been acquiesced in,

and has been repeatedly recognised as law, though never again directly questioned: *Ex parte Ross*, 2 Gl. & J.; *Gregory v. Hurrill*, 3 B. & C. 341; *Taylor v. Hyrkins*, 5 Id. 489.

Besides the mischief which the Statute of Limitations was intended to remedy, and which would be aggravated by the negligence in the preservation of evidence which they are calculated to induce, and do induce after their bar is supposed to shield a debtor from suit, all which apply as strongly in bankruptcy as in any other form of suit, there would be special hardships to bankrupts or supposed bankrupts, as well as to their creditors, in adopting a different rule in bankruptcy from that which prevails at law. Thus, an honest debtor, who makes a satisfactory and honorable composition with all his known creditors, would be liable to be prosecuted in this court as a fraudulent bankrupt for making that very composition; and this by a person who could not sue him in any court in this district, which is the only district in which proceedings in bankruptcy could be taken against him, and on the hearing of such a petition the presumption of law would be reversed, and he would be obliged to prove that he had paid an outlawed debt. So upon the question whether a debtor is insolvent or not, and many points. The mischiefs would be far-reaching and intolerable.

It is said that the Bankrupt Law, being uniform throughout the United States, ought to be so worked as to give every creditor who could sue in any state or territory of the Union right to proceed in bankruptcy, and, therefore, although it be granted that some limitation should be applied, it must be one which would be good throughout the Union. There is great plausibility in this argument, but it is not strong enough to meet the arguments on the other side. The right to sue must depend on the former. Statutes of Limitations relate only to the remedy, and cannot have any extra-territorial effect. If it were possible to have a statute of this kind of general territorial effect throughout the jurisdiction of the United States, it might be very useful, but there is none such. The general rule, therefore, sought to be applied, does not exist. If there were such a one, no doubt this debt would be barred by it, because it is a simple contract debt of more than ten years' standing, and such a debt is barred, I suppose, by the statutes of every state and territory when applied to defendants who have been within their jurisdiction for that

period. They do not bar suits against persons not within their jurisdiction simply because they have nothing to do with them.

Most of them, perhaps, following the common-law rule of prescription, and for purposes of convenience, bar all suits after twenty years, and the result of holding that the law of the states and territories where this remedy is not sought, shall be regarded, is simply to abolish the Statutes of Limitations, and revert to a common-law prescription. But the very fact that this debt is not barred by the laws of Oregon, or of any other state which has no jurisdiction over it, and because it has no jurisdiction over it, shows to my mind that the law of such a state ought not now to be applied to it. In such a matter as this the courts of the United States must, in the absence of a law of Congress, be guided by the law of the former. There can be no other rule.

The argument most strongly pressed in this case on behalf of the creditor is that the statute of bankruptcy intends that all debts should be discharged, wherever held; therefore, this debt must be discharged, and if so, it is a provable debt, for only provable debts are discharged.

There can be no doubt that this is a provable debt, and that it will be discharged by the certificate, if the bankrupt obtains one. All debts which by their nature are provable, are discharged whether they could be proved, in fact, or not. Thus, debts due an alien enemy, or to one dead or insane, or who accidentally failed to prove, or was not notified, all these, and many others that could be mentioned, would be barred, though it might be impossible that they could be proved. Because this debt is provable, it does not follow that it can be proved. The question is whether it is a debt at all. A debt that has been paid cannot be proved, but it will be discharged; that is to say, the payment need not be relied on after the certificate has been obtained. It would be a singular reply to a plea of discharge in bankruptcy, that the debt was not discharged because it could not have been proved, and that it could not have been proved because it had been paid, or because the court of bankruptcy found, rightly or otherwise, that it had been paid. Yet that is all that the rejection of this proof amounts to. Applying the law of the former, I find as a presumption of law that this provable debt has been paid. All provable debts are discharged; but all supposed debts, to which a certificate of discharge would be a bar, are not neces-

sarily provable. This difference arises in a case like this from the fact that the Bankrupt Law deals with the contract itself, and discharges it, and so necessarily has a much wider reach than the law of limitation, or than rules of evidence which touch only the remedy. The same thing is true in England, and would be so in our states excepting that (by construction) the Constitution of the United States forbids them to deal in this mode with contracts between citizens of the different states. In England the Statutes of Limitations and of Bankruptcy are passed by the same legislature, but one has a much wider operation than the other, so that a debt held in Scotland or England, or the Colonies, or abroad, may be discharged, though the Statute of Limitations may prevent its being proved. Mr. Christian, whose opinion and practice had been much opposed to *Ex parte Dewdney*, gives us to understand that the argument that the whole debts would necessarily be discharged, was not overlooked in the discussion of that case. The argument that Congress by discharging debts due throughout the Union must intend to adopt all the Statutes of Limitations in the Union proves too much. The same argument will show that it must have adopted those of all the commercial countries in the world, for debts due throughout the world are discharged in bankruptcy if the contract were to be performed here: *Hunter v. Potts*, 4 T. R. 182; *Potter v. Brown*, 5 East 124; *May v. Breed*, 7 Cush. 15; Story's Conflict of Laws, § 335, &c.

The hardship of this rule is much less than at first might appear. It is only on the supposition that the creditor might possibly sue his debtor away from home that there is any hardship at all. All that the foreign creditor has to do is to sue his debtor at home, and in due season, and keep his debt alive. Our Statute of Limitations makes no discrimination against foreign creditors, but, in some respects, quite the contrary; for, if he has been beyond seas, he has a longer time allowed him. If within the United States, there is no reason for any discrimination in his favor. The complaint of any creditor that he might probably find a foreign forum, which, because it is foreign, would give him a remedy which he has lost by negligence in the true and proper forum, is not entitled to much consideration. One case of practical hardship may be put, and that is when a creditor has actually sued his debtor away from home, and obtains security by

attachment or otherwise, which would be taken away by the bankruptcy, and yet he would have no right to prove his debt. I consider that the Bankrupt Law makes a sufficient provision for such a case, for the reason that the action might be prosecuted to final judgment, and the amount of the judgment be proved in bankruptcy.

I agree with Judge BLATCHFORD, that the bankrupt, by putting the debt upon his schedule, does not make a new promise to pay it. This depends somewhat upon the particular Statute of Limitations, and it has been so decided in Massachusetts, in a case under the State Insolvent Law, so called, which is a bankrupt law, though one limited and restrained in its operation by the Constitution of the United States. And it is so upon principle, because the debtor does not make out his schedule with any view to the payment but to the discharge of his debts. And, besides, the creditors have a right to plead the statute as well as he, and they are not bound by his schedule: *Richardson v. Thomas*, 13 Gray 381; *Roscoe v. Hale*, 7 Id. 274; *Stoddard v. Doane*, 7 Id. 387; and see the cases in *Roscoe v. Hale*. In these cases, it is true, the debt was not barred when the schedules were made, but if the schedule were evidence of a new promise, two of those decisions must have been for the plaintiff, because the schedules had been made within six years before suit brought. The fact weakens the argument to this extent, that it cannot be said the debtor was merely carrying out his legal duty in putting the debt in his list, and that he did it, as it were, under legal compulsion, and not voluntarily. I do not suppose that he would be so bound in respect to this debt, but it still remains true that he did it *diverso intuitu*.

In the *Matter of Harden*, (Bankrupt Register for March 30th 1868,) Judge Fox of the United States District Court for Maine, concurs with Judge LOWELL in his opinion that debts barred by the Statute of Limitations of the state where proceedings are had, cannot be proved in bankruptcy, while just as we go to press we have received a manuscript copy of opinion by Judge HALL, of the Northern District of New York, in the *Matter of Sheppard* concurring in the opposite construction of the Bank-

rupt Act by Judge BLATCHFORD in the *Matter of Kay*, ante p. 283.

A point of great doubt and of much importance has thus already arisen under the Act, on which the rulings are likely to differ in different districts until it shall be settled by the Supreme Court. It is much to be regretted that the state of the business in that Court affords little hope that any case arising under the Bankrupt Act will be reached for several years.

J. T. M.

United States District Court, Southern District of Ohio.

LEMUEL PERRY v. WILLIAM H. LANGLEY.

A general assignment by an insolvent debtor, though made for the benefit of all his creditors, is an act of bankruptcy under the Bankrupt Act of March 2d 1867.

Where a creditor is about to get a judgment against his debtor, and the latter makes a general assignment under a state insolvent law for the benefit of his creditors, this is a conveyance with intent to delay, defraud, and hinder the creditor, and is an act of bankruptcy under sect. 39 of the Bankrupt Act.

It comes also under the description of a conveyance to defeat or delay the operation of the Bankrupt Act.

Where a debtor made an assignment under a state insolvent law, and a creditor applied to the state court to have the security of the assignees increased, this was not such an assent to the proceedings as estopped him from claiming that the assignment was an act of bankruptcy.

A debtor made an assignment under the insolvent law of Ohio on May 25th 1867, and under it a state court took cognisance of the matter. On July 17th a petition in bankruptcy was filed by a creditor. *Held*, that as to this matter the Bankrupt Act of 1867 was in force on May 25th, and the United States court could rightfully take jurisdiction of the whole matter under the petition filed in July.

THIS was a petition in bankruptcy, under the Act of 1867, praying that Wm. H. Langley be declared a bankrupt. The only distinct act of bankruptcy alleged in the petition is that Langley, then being largely insolvent, on the 25th day of May 1867, executed an assignment of all his property to two assignees, named, in trust for the benefit of all his creditors. This assignment is alleged to be fraudulent and void, as intended, *first*, to delay, defraud, or hinder his creditors; *second*, to defeat or delay the operation of the Bankrupt Law.

Langley filed an answer, admitting the assignment of his property as alleged in the petition, and his utter insolvency at the date of its execution; but denied explicitly that it was fraudulent, either in fact or in law, or that it was intended to defeat or delay the operation of the Bankrupt Act. He averred that his object was to prevent the petitioning creditor, Perry, from obtaining an unjust preference over other creditors, and to secure an equal distribution of his property among all his creditors.

The facts were, that Langley had been engaged in business at Gallipolis; that in the spring of 1866 he became embarrassed in his pecuniary affairs; that prior to the 25th of May 1867—the date of the assignment—with an admission of his hopeless insolvency, he assigned his entire property, in trust for the benefit

of all his creditors ; that this assignment was filed in the Probate Court of Gallia county, and put on record on the said 25th of May, and an order made by the Probate judge, for security by the assignees, pursuant to the statute of Ohio on that subject ; that the assignees took possession of the property, and were proceeding to administer the same ; and that on the 17th of July, the said Perry filed his petition in bankruptcy, embracing a prayer for an order restraining the assignees from any further interference with the property of Langley under said assignment ; which prayer was granted by this court ; and the assignees have suspended all further proceedings, awaiting the judgment of the court upon the question whether the act of bankruptcy charged in the petition was or was not in violation of the Bankrupt Law.

Nash and *T. D. Lincoln*, for petitioning creditor.

Coffin, for Langley.

The opinion of the Court was delivered by

LEAVITT, J.—The grounds of opposition to a decree of bankruptcy against Langley, comprehensively stated, are—1. That the assignment by him on the 25th day of May was not an act of bankruptcy within the purview of the statute. 2. If an act of bankruptcy, the petitioning creditor, Perry, is estopped from urging or relying upon it, by reason of his implied assent to the assignment. 3. That at the date of the assignment—the 25th of May—the Bankrupt Act of the 2d of March 1867, was not in force, except for a special and limited purpose ; and that the Probate Court of Gallia county, having rightfully obtained jurisdiction of the assignment under the statute of Ohio, on the 25th of May, and prior to the Bankrupt Act taking full effect, is entitled to retain it ; and that the assignees are fully empowered to act under it, and execute its provisions, irrespective of the Bankrupt Act.

I. The first question, therefore, is, whether the assignment by Langley, is an act of bankruptcy within the meaning of the statute, upon the hypothesis that the law was then in force as applicable to the transactions involved in this case.

It is claimed by the counsel for the petitioning creditor, that the assignment is void ; *first*, as being executed by Langley, with an actual, fraudulent intent ; *second*, that, being for his entire property, it is presumptively fraudulent, under the operation of

the Bankrupt Act, and, therefore, void ; and, *third*, that it is void as being with an intent to defeat and delay the operation of that act.

As to the first inquiry suggested, namely, whether the assignment was executed with a positive, fraudulent intent, it is, perhaps, not important to inquire. The consideration of the other points stated as to the legal effect of the assignment, under the provisions of the Bankrupt Act, will be decisive of the question before the court. If subject to the imputation of legal, or constructive fraud, as in conflict with the act, the effect as to its validity is the same as if a fraud in fact were proved.

The question involves the construction of the 39th section of the Bankrupt Law, in connection with the 35th, which defines what shall constitute acts of bankruptcy. And so far as the 39th section relates to the transfer, sale, or conveyance of property by one who is insolvent, it is declared to be an act of bankruptcy, when made—1. “With intent to delay, defraud, or hinder creditors.” 2. “With intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him, as indorsers, bail, sureties, or otherwise.” 3. “With intent * * * to defeat or delay the operation of this act.”

1. Was the assignment by Langley intended to delay, defraud, or hinder a creditor or creditors ? The argument in favor of the legality and fairness of the assignment is, that being for the equal benefit of all his creditors, fraud cannot be presumed. Now, it true that an assignment or conveyance of all his property by a bankrupt, for the benefit of his creditors generally, unless with some one of the intents specified in the 39th section above noticed, is not declared to be an act of bankruptcy. Yet, it is clear that such an assignment is in contravention of the spirit and policy of the Bankrupt Law, even when made in good faith. The intention of that law clearly was, that when a failing debtor was conscious of his inability to prosecute his business and pay his debts, he should at once subject his property to such a disposition as the Bankrupt Act has provided for. The property then becomes a sacred trust for the benefit of his creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent laws of a state, but according to the provisions of the National Bankrupt Act. Indeed, it has been the settled doctrine

in the United States, under any bankrupt law that has been passed, that when Congress had called into exercise the clear constitutional grant of power to pass a uniform bankrupt law, the jurisdiction and legislation of the state as to the settlement of insolvent estates, was wholly suspended, to be resumed only when the national law ceased to be in force. This doctrine is not controverted, and it seems hardly necessary to refer to the cases which sustain it.

In England the decisions have been uniform from the time of Lord Mansfield, that an assignment of all his property, by an insolvent debtor, for the benefit of all his creditors, was an act of bankruptcy, even where no actual fraud was intended: Deacon on Bankruptcy 72, 73; Griffith on Bankruptcy 107, 119, 120.

The same doctrine has been settled in this country under the Bankrupt Act of August 1840: *McLean, Assignee, v. Meline et al.*, 3 McLean's R. 190; also, *McLean, Assignee, v. Johnson et al.*, 3 McLean's R. 202; *Shawhan et al. v. Wherritt*, 7 How. 627. And it is understood from newspaper reports, that the same doctrine has been uniformly held by all the judges of the United States, before whom the question has been presented, under the recent Act of the 2d of March 1867. And if there was any doubt upon this question, under the 39th section of this law, it would seem to be removed by reference to a clause in the 35th section of the act. The 35th section does not define acts of bankruptcy, but declares what conveyances or transfers of property by a bankrupt shall be deemed void, and vests no title as against the assignee in bankruptcy. This clause is in these words: "And if such (any) sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud." This clause throws light upon the intention of the legislature in the enactment of the 39th section, and shows that any assignment or transfer of property by a failing debtor, not in the usual and ordinary course of business, is not only void, but evidence of fraud. Now it cannot be claimed that an assignment of all a debtor's property, for any purpose, is in the usual and ordinary line of business. Its effect is to put a stop to all business, by disposing of all the means by which it can be carried on. And this is one of the reasons given by the English courts why a

general assignment of all a debtor's property is, *per se*, an act of bankruptcy.

2. But whether the assignment is void, on the ground of presumptive fraud, it seems clear it is within the clause of the 39th section of the act, declaring any assignment, or transfer of property, by one in contemplation of bankruptcy, with intent "to delay, defraud, or hinder his creditors," shall be an act of bankruptcy. There would seem to be no doubt, from the facts in evidence, that this intent was in the mind of Langley in making this assignment. Indeed, he avers in his answer that this purpose was to prevent the petitioning creditor, Perry, from obtaining a priority over other creditors. This was an intent, within the meaning of the statute, to delay or hinder a creditor from obtaining his legal rights. Perry had sued Langley in the Common Pleas of Gallia county for a debt of some \$5000, some time prior to the 25th of May, 1867, on which, by the rules of the court, he would be entitled to a judgment, and did obtain a judgment on the 1st of June, which, under the statute of Ohio, took effect and was a lien from the first day of the term, which was the 27th of May. There can be no doubt that Perry had a right to take all lawful means to secure his debt. No censure could attach to him for doing so, though it might give him an advantage over other creditors. All the creditors had the same right, and all who were thus vigilant would be entitled to all the legal benefits of their diligence. He was defeated and delayed in this by the act of Langley in assigning all his property, and thus putting it beyond the reach of an execution. This clearly brings the assignment within the words of the statute as an act of bankruptcy. Langley avers in his answer, that one object in view in making the assignment was to prevent Perry from obtaining a preference over other creditors; and this, he assumes, was a meritorious purpose. But the law does not so view it. In its effect, it was delaying and hindering a creditor in a legal effort to secure his debt.

3. But there is still another ground, on which the assignment must be adjudged to be an act of bankruptcy. It was clearly within the provision of the 39th section of the Bankrupt Act, declaring in substance that any conveyance, or transfer of property, with intent "to defeat or delay the operation of the act," to be an act of bankruptcy. The facts lead, with great certainty, to the conclusion that Langley must have intended to withdraw

his property from the operation of the statute, and administer it through trustees of his own selection, and subject to his influence, and not by assignees selected by the creditors. If such was the design of Langley, even if honestly intended, the assignment, in its effect, was to defeat or delay the operation of the law. The Bankrupt Act was approved on the 2d of March, 1867, to take effect as to the appointment of officers and the preparation of rules of proceeding, from that day, and for other purposes, not till the 1st day of June following. The act, immediately after its approval, was published in all the leading newspapers of the country, and its provisions well known to the reading public. Langley, on the 25th of May, made the assignment in question. He had only to wait five days, till the Bankrupt Act would be in full operation, and the way opened for filing his petition and obtaining an adjudication in bankruptcy; and thus subjecting his property to distribution according to the just requirements of the act. Practically the assignment delayed or defeated the operation of the law, and as I think, was so intended by Langley. This was depriving the creditors of a legal right under the statute, and was clearly in contradiction of its spirit and its letter. And the fact proved, that a few days after the assignment, Langley made a formal proposition to his creditors to compromise with them, by giving his promissory notes for forty cents on the dollar of his indebtedness, payable in instalments within five years, may at least justify the suspicion that the assignment was intended to facilitate such a compromise.

II. This leads me to the consideration of the second ground of objection to a decree of bankruptcy against Langley, namely: that the petitioning creditor, Perry, is estopped from urging or relying upon the assignment as an act of bankruptcy, for the reason that he assented to it, and cannot now in good faith, object to it. The well-known doctrine of estoppel is undoubtedly applicable in such a case, if the facts justify its application. It would clearly be in violation of a rule of good morals, as well as of law, that one should give his assent and approval to an act, and afterwards for his own advantage, denounce the act as illegal and immoral. If the proof was that Perry had advised the making of the assignment, or, after its execution, had expressly given his assent to it as a creditor of Langley, he would have been precluded from insisting on it as an act of bankruptcy, and could not

have maintained a standing in this court as a petitioning creditor. But there is no evidence placing him in this position. The only fact relied on is that, after the assignment had been made, and assignees had been approved of by the Probate Judge of Gallia county, and a bond ordered and given by the assignees in the very inadequate sum of \$15,000 (the assigned estate being in value about \$175,000), Perry applied to the court to have the penalty increased, which was done by order of the court. This was clearly no approval of, or assent to, the assignment, and this exception to the petition must be overruled.

III. There yet remains for consideration the third objection to a decree of bankruptcy against Langley. This, as before stated, is in substance that, on the 25th day of May 1867, the date of the assignment to the trustees, the Bankrupt Act, as to this transaction, was not in force; that the statute of Ohio, legalizing such assignments, was then operative; and the Probate Court, having rightfully acquired jurisdiction of the proceeding, had authority to retain it until it was ended; and that the jurisdiction of that court was not affected by the Bankrupt Act, which did not take full effect until the 1st of June.

This point has been strenuously insisted on by the able counsel representing Langley, and I am free to confess that as a first impression it seemed plausible, if not unanswerable. Upon full reflection I am satisfied his argument is untenable, and I will state very briefly the reasons which have led to this conclusion.

The 50th section of the Act of March 2d 1867 provides that the act as to the appointment of officers and the promulgation of rules and general orders shall take effect from its approval: "Provided that no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, A. D. 1867." The phraseology of this proviso is somewhat peculiar and significant. It does not declare that the statute, as to all matters not included in the preceding part of the section, shall not take effect till the first day of June, but merely that no proceedings shall be instituted under the act before that date. Its effect therefore is, by a fair construction, that while it suspends the right to proceed until the day named, it was the intention of the law-makers that as to the body of its provisions, it should take effect from its passage. If this were not the intention, why provide specially that no petition should be filed, or other pro-

ceeding had before the first of June? If it had been intended to postpone the operation of the entire act, except for the specific purpose mentioned in the beginning of the section, until the day named, it may be pertinently asked why it was not so expressed in clear terms? Not being so expressed, and the words used not admitting of such a construction, the conclusion is irresistible that it was not intended that the main provisions of the act should be a dead letter until the first of June. On the contrary, it would seem to be clear it was intended that these should be operative from the day the act was approved. The reason for the postponement of the law as to proceedings under it is well known. The law had made it the duty of the Supreme Court to prescribe orders and rules in bankruptcy; and these, from the pressure of other duties, could not be prepared before the first of June. For the purpose of insuring uniformity in the proceedings, it became necessary to suspend the right of petitioning until that day; but for all other purposes it was operative from its passage. And it is most obvious that any other construction of the section referred to would have had a very decided effect in defeating the object of the statute. If all transactions occurring prior to the first of June, though plainly in conflict with the provisions of the Bankrupt Act, and involving gross frauds, were withdrawn from its operation, and virtually legalized, great facilities would have been afforded for the evasion of the salutary restrictions and prohibitions of the statute. And it can hardly be imputed to Congress that such a result could have been intended.

But aside from the 50th section of the act, there are other evidences that it was intended the statute should take effect in its main provisions from its passage. In the beginning of the 39th section it is provided "that any person residing and owing debts as aforesaid, who, *after the passage of this act,*" shall commit any of the numerous acts of bankruptcy specified in the section, may be proceeded against in bankruptcy. The words are not, after this act shall take effect, but, after the passage of the act, which means plainly, after the 2d of March, the date of the approval of the act. And this is not within the category of retroactive laws, as its operation is upon future transactions, and not those that are past.

In addition to this, light is cast upon the question under review by the 35th section of the statute. The purpose of this section is

to point out under what circumstances conveyances and transfers of property by one in contemplation of bankruptcy shall be deemed fraudulent and void; and it prescribes the duties and powers of assignees in bankruptcy in proceedings to set aside such conveyances and transfers, and for the recovery of property thus fraudulently sold or disposed of. In the beginning of the section it is provided "that if any person being insolvent, or in contemplation of insolvency, *within four months* before the filing of the petition, by or against him, shall dispose of his property in the way specified, his acts shall be fraudulent and void, and the property disposed of may be recovered by his assignee in bankruptcy." Here, it will be observed, the limitation as to time is *four months* prior to the filing of the petition. And any act within the purview of the section, committed within that time, is declared to be fraudulent and void. Now in this case the assignment by Langley was on the 25th of May, and the petition in bankruptcy was filed the 17th of July following; and as less than four months intervened, the assignment is within the operation of the 35th section.

If, therefore, there was a doubt as to the true construction of the 50th section of the act, the reference to the 35th and 39th sections shows conclusively that the statute extends to transactions occurring prior to the 1st of June 1867, and that they are proper subjects of jurisdiction under the Bankrupt Law.

Now it is not denied by counsel that the Bankrupt Act of the 2d of March 1867, so far as it defines what are acts of bankruptcy, and points out the mode of proceeding, supersedes all insolvent laws of the state. I have before referred to this well-settled doctrine, and will now only cite some of the authorities by which it is sustained: *Ex parte Earnes*, 2 Story's R. 324; *Judd v. Ives*, 4 Metc. 401; 4 Wheat. 195; 5 Id. 22; and also a very learned opinion by Judge WILLIAMS, of the District Court of Allegheny County, Pa., in *Commonwealth v. O'Hara*, 6 Am. Law Reg. N. S. 765.

It results conclusively that if the provisions of the Bankrupt Act were in force on the 25th of May 1867, the date of the assignment, and that assignment was within the scope and intent of the law, and, as an act of bankruptcy, altogether null and void, the Probate Court of Gallia county had no jurisdiction of the assignment, and the acts of that court in regard to it are wholly

invalid. And no argument is needed to prove that no court can legitimately obtain jurisdiction by any act against law and inherently void. The argument, therefore, that the Gallia county Probate Court, having obtained jurisdiction under the state law, is entitled to retain it to the end of the proceeding, has no force or application. That court had no authority to act in the matter of the assignment, as the jurisdiction of this court was paramount and exclusive. There is, therefore, no conflict of jurisdiction.

A decree in bankruptcy must be entered; and the usual order for a warrant is directed to be made. As a matter of course, the motion to dissolve the injunction heretofore granted, is overruled.

United States District Court—Southern District of New York.

IN THE MATTER OF OLIVER W. DODGE, A BANKRUPT.

Where at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one in which no assets have come into his hands.

THE only assets of the bankrupt consisted of certain notes, accounts, and claims, all past due and unpaid, in which he had a one-seventh interest valued at \$250, which interest had passed to the assignee, who had not received or paid any moneys whatever, for or on account of the bankrupt's estate.

One or more creditors proved their claims against the estate of the bankrupt.

More than sixty days having elapsed since the adjudication of bankruptcy, the question arose whether the bankrupt could now apply to the court for his discharge under section 29 of the act on the ground that there are no assets; whether accounts, claims, and demands from which nothing may be collected or realized are to be considered to be assets within the meaning of said section 29 so as to prevent the bankrupt from making application for his discharge until after the expiration of six months.

On the request of the parties the question was certified to the judge for his opinion thereon.

BLATCHFORD, J.—Where at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one in

which no assets have come to his hands, within the meaning of section 29 of the act. This is the interpretation given to such expression "no assets" by the Justices of the Supreme Court.

Form No. 35 is headed "assignee's return where there are no assets;" and that form consists merely of the oath of the assignee that he has "neither received nor paid any moneys on account of the estate."

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF MAINE.²

AGENCY.

Order by Principal to pay Creditor.—If a debtor, having funds in the hands of his agent, verbally orders him to pay a creditor, and the agent promises to execute the order, and the creditor accepts and relies upon the agent's promise, the debtor's power to control so much of the funds as is necessary to redeem such promise is gone: *Goodwin v. Bowden*, 54 Me.

In such case, the agent's promise becomes an original undertaking, and the funds in his hands are a sufficient consideration for his engagement: *Id.*

ASSUMPSIT.

For Proceeds of Property tortiously taken and sold.—The proceeds of unbranded pressed hay, tortiously taken and sold, or wrongfully sold by one not the owner, but lawfully possessed thereof, may be recovered by the owner in *assumpsit* for money had and received against such tortious vendor: *Foye v. Southard*, 54 Me.

ATTACHMENT.

Validity against subsequent Purchaser.—An attachment of real estate, made on a writ specifying that "the claims intended to be proved under the foregoing money counts, are money obtained of plaintiffs by defendant, on notes" specifically described, may be valid as against a subsequent purchaser, although neither of the notes mentioned was due at the time the writ issued: *Jordan v. Keene*, 54 Me.

BILLS AND NOTES.

Waiver of Notice.—A waiver of demand and notice may be proved by parol, or may be inferred from acts and circumstances, in an action against the indorser of a negotiable promissory note: *Keyes v. Winter*, 54 Me.

¹ From J. W. Wallace, Esq., Reporter; to appear in Vol. 6 of his Reports.

² From W. W. Virgin, Esq., Reporter; to appear in 54 Maine Rep.

Defendant, applying to the plaintiff for a loan of money, was informed by the latter that if he would get, and indorse in blank, defendant's brother's note, and give his word upon honor that if his brother did not pay it he would, he would loan him the money. Defendant replied that he was willing to give his word, and that he expected to be holden if he got the money; adding, that he desired the plaintiff to wait as long as he could for his pay, and, if his brother did not pay, he (defendant) would. In an action upon such a note, given the next day—*Held*, that there was a waiver of demand and notice: *Id.*

Negotiability.—A note payable to an insurance company or order for a sum certain, "and such additional premium as may become due on" a policy named, and at a time therein specified, is not negotiable: *Marratt v. Equitable Ins. Co.*, 54 Me.

COMMON CARRIER.

Damages for Delay in Transportation.—In an action against a common carrier for damages in not seasonably transporting flour, the decline in its market value between the time when it actually arrived at its place of destination, and when, in the exercise of proper diligence on the part of the carrier, it might have so arrived, is a material element proper for the consideration of the jury in ascertaining the actual damages sustained by the shipper: *Weston v. Grand Trunk Railway Co.*, 54 Me.

CONFEDERATE STATES. See *Insurance*.

CONSTITUTIONAL LAW.

Right of Free Locomotion from State to State.—A special tax on railroad and stage companies for every passenger carried out of the state by them, is a tax on the passenger for the privilege of passing through the state by the ordinary modes of travel, and is not a simple tax on the business of the companies: *Crandall v. State of Nevada*, 6 Wall.

Such a tax imposed by a state is not in conflict with that provision of the Federal Constitution, which forbids a state to lay a duty on exports: *Id.*

The power granted to Congress to regulate commerce with foreign nations and among the states, includes subjects of legislation which are necessarily of a national character, and therefore exclusively within the control of Congress: *Id.*

But it also includes matters of a character merely local in their operation, as the regulation of port pilots, the authorization of bridges over navigable streams, and perhaps others, and upon this class of subjects the state may legislate in the absence of any such legislation by Congress: *Id.*

If the tax on passengers when carried out of the state be called a regulation of commerce, it belongs to the latter class; and there being no legislation of Congress on the same subject, the statute will not be void as a regulation of commerce: *Id.*

The United States has a right to require the service of its citizens at the seat of Federal government, in all executive, legislative, and judicial departments; and at all the points in the several states where the functions of government are to be performed: *Id.*

By virtue of its power to make war and to suppress insurrection, the government has a right to transport troops through all parts of the Union by the usual and most expeditious modes of transportation: *Id.*

The citizens of the United States have the correlative right to approach the great departments of the government, the ports of entry through which commerce is conducted, and the various Federal offices in the states: *Id.*

The taxing power being in its nature unlimited over the subjects within its control, would enable the state governments to destroy the above-mentioned rights of the Federal government and of its citizens, if the right of transit through the states by railroad and other ordinary modes of travel were one of the legitimate objects of state taxation: *Id.*

The existence of such a power in the states is, therefore, inconsistent with objects for which the Federal government was established, and with rights conferred on that government and on the people. An exercise of such a power is accordingly void: *Id.*

CONTRACT.

Liquidated Damages.—In the event of his failure to faithfully “do and perform each and every condition and stipulation expressed in” a certain license and agreement, for carrying on a lumbering operation upon the plaintiff’s land, the defendant bound himself in writing to the plaintiff, “in the full and liquidated sum of \$1000, over and above the actual damages which the plaintiff might sustain by reason of such non-performance. In an action to recover the \$1000—*Held*, that the sum named was liquidated damages, and recoverable: *Dwinel v. Brown*, 54 Me.

COURTS.

Jurisdiction—Political Questions as distinguished from Judicial.—A bill in equity filed by one of the United States calling upon the court to enjoin the secretary of war and other officers who represent the executive authority of the United States from carrying into execution certain Acts of Congress, on the ground that such execution would annul and totally abolish the existing state government of the state, and establish another and different one in its place—in other words, would overthrow and destroy the corporate existence of the state by depriving it of all the means and instrumentalities whereby its existence might and otherwise would be maintained—calls for a judgment upon a political question, and will therefore not be entertained: *State of Georgia v. Stanton*, 6 Wall.

This character of the bill is not changed by the fact that, in setting forth the political rights sought to be protected, the bill avers that the state has real and personal property (as for example, the public buildings, &c.), of the enjoyment of which, by the destruction of its corporate existence, the state will be deprived; such averment not being the substantive ground of the relief sought: *Id.*

DAMAGES. See Common Carrier—Contract.

For Breach of Agreement to Reconvey Real Estate.—The plaintiff conveyed her farm to one W., receiving back a writing obligatory to reconvey upon the conditions therein specified, which obligation she assigned to the defendant in consideration of his oral agreement to redeem and

take a deed of the farm from W., and then execute and deliver her a similar writing to reconvey to her whenever, within three years, she should pay him whatever should be reasonably due for services and expenditures. The defendant redeemed and took a deed of the farm from W., but refused to execute and deliver said obligation, and conveyed away the farm to D. In *assumpsit*, for breach of the agreement—*Held*, that, under the general issue, the damages were the actual value of the farm, after deducting the amount actually paid by the defendant to redeem, and such other sums paid out and for services rendered by him at her request, as she had agreed to allow: *Lawrence v. Chase*, 54 Me.

DEED.

Delivery.—A deed executed and left by the grantor with a third person, by request and direction of the grantee, is a sufficient delivery: *Hatch v. Bates*, 54 Me.

No one but a creditor of the grantor can avail himself of the objection that a deed was given without consideration: *Id*.

Merger.—Where the title of two adjoining closes becomes united in one person, all subordinate rights and easements are extinguished: *Warren v. Blake*, 54 Me.

Description of Lands—Metes and Bounds—Map or Plan.—Where an owner of land surveyed and laid out into lots, with a street represented upon the recorded plan as running east and west between the two ranges of lots, simultaneously conveyed the south range to the defendant, commencing at the west end of the "southerly line of the street as laid down on" the plan, thence south and east, certain specified distances, thence north, up a specified stream, "to a point where a line drawn from the point of beginning, at right angles with" the first line, "would strike said stream, thence westerly, at right angles with" the first line, "to the place of beginning;" and the north range to the plaintiff, commencing at the west end of the "southerly line of" the street, "according to the plan, thence easterly by the line of said street, as laid down on said plan, to the" stream, "thence north and west" certain specified distances, "thence southerly," by a specified line, to the place of beginning: *Held*, that the fee in all of the land covered by the street passed to the latter and not to the former: *Warren v. Blake*, 54 Me.

The clauses in the deed to the grantor of the defendant, "with the buildings thereon," and "to have and to hold the above-granted premises, with all the privileges and appurtenances thereto belonging," will not pass the fee to so much of said street as is covered by the north end of the brick stable erected on the south range of lots, nor to the passage-way thereto, subject to an easement, to the plaintiff to pass thereon to his pasture: *Id*.

If the owner of two adjoining closes, over one of which a convenient passage-way exists for the benefit of the other, simultaneously conveys them to two different purchasers, the right to use the passage-way will not pass as an easement or appurtenance to the purchaser of the latter close, unless such use be a matter of strict necessity: *Id*.

Timber cut may pass.—Timber trees, cut down and lying at full length upon the ground where they grew, will pass by a deed of the land: *Brackett v. Goddard*, 54 Me.

Consideration—Subsequent Creditors.—A conveyance made without consideration, and for the purpose of defrauding creditors, is void as well against subsequent as prior creditors of the grantor: *Marston v. Marston*, 54 Me.

DIVORCE.

Jurisdiction—Non-resident Parties.—The Supreme Judicial Court of this state cannot divorce from the bonds of matrimony a husband and wife who were married without the state, and who since their inter-marriage have only been in it for a few days on a visit, and never as residents: *Calef v. Calef*, 54 Me.

EASEMENT. See *Deed*.

EQUITY.

Answer not complete until Filed.—An answer to a bill in equity, complete in every respect, cannot be treated as an answer until the party has filed it: *Giles v. Eaton*, 54 Me.

If he died before filing the same, it cannot be filed as an answer by the solicitor: *Id.*

His executors may, however, consider how far and to what extent they can properly incorporate into their answer the facts set forth in the unfiled answer: *Id.*

EVIDENCE. See *Husband and Wife*.

Date of Promissory Note—Illegible Writing—Parol Evidence.—Where it is necessary to determine the date of a promissory note in suit, and offered in evidence, and the name of the month is so inartificially written that, upon inspection, the presiding judge cannot determine whether it should be read June or January, extraneous evidence is admissible to show the true date: *Fenderson v. Owen*, 54 Me.

And the question is a proper one to be submitted to a jury: *Id.*

EXECUTORS AND ADMINISTRATORS.

Foreign Executor no authority to act.—An executor, though qualified as such by the laws of another state, has no authority by reason of such qualification to act as such in this: *Gilman v. Gilman*, 54 Me.

De son tort.—In trover by the rightful administrator of an intestate's estate to recover the value of the goods and effects of the estate taken by an executor *de son tort*, the defendant cannot file an account in set-off for the intestate's debts, paid by him since the decease: *Tobey v. Miller*, 54 Me.

But, by virtue of R. S., c. 64, § 32, he may "retain" whatever sums actually paid him, which, if withdrawn from his hands, the rightful administrator or executor would be compelled to pay: *Id.*

HUSBAND AND WIFE.

Admissions as Evidence of Marriage, for Collateral Purposes.—Admissions of marriage, by the plaintiff, are competent evidence in support of a plea in abatement for the nonjoinder of her husband: *Laughlin v. Eaton*, 54 Me.

Suit by Married Woman.—The well-established doctrine of the common law, that a married woman cannot sue alone for malicious prosecution, has not been changed by R. S., c. 61: *Id.*

She cannot sue alone in such action, although her husband went, several years since, to California, but is alive, keeps up a correspondence, and frequently sends her funds: *Id.*

INSURANCE.

Government de facto, as Distinguished from lawful Government—Insurance—Capture.—A taking of a vessel by the naval forces of a now extinct rebellious confederation whose authority was unlawful, and whose proceedings in overthrowing the former governments were wholly illegal and void, and which confederation has never been recognised as one of the family of nations, is a "capture" within the meaning of a warranty on a policy of insurance having a marginal warranty "free from loss or expense by capture," if such rebellious confederation was at the time sufficiently in possession of the attributes of government to be regarded as in fact the ruling or supreme power of the country over which its pretended jurisdiction extended: *Mauran v. Insurance Co.*, 6 Wall.

Accordingly a seizure by a vessel of the late so-called Confederate States of America, for their benefit, was a capture within the terms of such a warranty: *Id.*

Clause in Policy that no action shall be maintained without previous offer to refer the Claim to Referee.—In an action upon a policy of marine insurance, stipulating that in case any dispute shall arise in relation to any alleged loss, it shall be referred to and determined by referees to be mutually chosen by the parties; that no policy holder shall maintain any action thereon until he shall have offered to submit his claim to such reference; and that in case any suit shall be commenced without such offer, the claim shall be released and discharged, and the company exempted from all liability under it: *Held*, such stipulations are void: *Stephenson v. Piscataqua F. and M. Ins. Co.*, 54 Me.

Such a policy, causing "S. & Co. to be insured, for whom it concerns, in the sum of \$700, on schooner 'Arbutus,' of," &c., "at and from," &c., "the above to cover their claim for supplies furnished said vessel:" *Held*, 1. That the policy does not apply to the supplies only; and 2. That any conversation between the owner and the plaintiffs tending to show authority from the former to the latter to take out this policy is admissible: *Id.*

And when the policy provides that the defendant company is, in case of prior insurance, answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk: *Held*, that the jury, if they found for the plaintiffs, should ascertain the value of the schooner at the time of the loss; and if they should find the whole amount of insurance did not exceed such value, and the loss a total loss, they might assess as damages the amount insured by the defendants, with interest from the time it was payable: *Id.*

In case of a sale from necessity by the master, the salvage belongs to the insurers; and the assured is entitled to recover the full amount of his claim, irrespective of the amount of salvage received by the insurers: *Id.*

An alleged copy of a survey, not made by order of a court of admiralty, or under the sanction of an oath, is not admissible in evidence, though certified and stamped by the American consul at the port where the survey was made: *Id.*

A policy of marine insurance covers not only losses that result from injuries caused by extraordinary perils of the sea which become immediately known, but such also as result from latent injuries: *Id.*

The authority of a master to sell the vessel and cargo in case of marine disaster, rests exclusively upon the ground of necessity, the burden being upon the assured: *Id.*

Life Insurance—Suicide by Insane Person.—The condition in a policy of life insurance, "that in case the insured shall die by his own hand, or in consequence of a duel, or the violation of any state, national, or provincial law, or by the hands of justice, this policy shall be null, void, and of no effect," does not include suicide by an insane man in a fit of insanity: *Easterbrook v. Union M. Life Ins. Co.*, 54 Me.

LEASE.

Perpetual Right of Renewal—Fee of Landlord not passed by such a Contract.—A lease for a term of years, conditioned for the payment of an annual rent, with a perpetual right of renewal, does not divest the lessor of his fee in the premises: *Page v. Ety*, 54 Me.

A conveyance of the leased premises by the lessor makes the grantee the landlord of the lessee, with the right to possession upon a forfeiture for breach of the conditions of the lease: *Id.*

A surrender of the lease, after such conveyance, to the original lessor, gives him no interest in the premises; and if the lease is cancelled, the grantee holds the premises discharged of the encumbrance: *Id.*

LIBEL.

Words not Actionable.—Innuendo.—Words in a declaration of libel, not in themselves libellous, are not enlarged or extended by an innuendo: *Emery v. Prescott*, 54 Me.

The words, to "carry the" plaintiff "back to Thomaston, where he came from," are not of themselves libellous: *Id.*

Nor does the innuendo that Thomaston means "the state prison situated in the town of Thomaston, which place is known by the name of the town," unexplained by introductory matter, make the words actionable, which, without innuendo, would not be libellous: *Id.*

LIMITATIONS, STATUTE OF.

Partial Payment.—The partial payment of an account, made within six years, and appropriated toward the payment of the account as a whole, and not to any one or more of its particular items, will take the account out of the Statute of Limitations: *Dyer v. Walker*, 54 Me.

MISNOMER.

Upon the issue raised by a replication to a plea of misnomer, that the defendant was known as well by the name in the indictment as by that in the plea, the presiding judge, after stating to the jury the question at issue, illustrated it as follows:—"If a stranger should go * * where the

defendant is known, and inquire for the house of" the person named in the indictment, "would those of whom he inquired recognise the man inquired for as well by that name as by the name used in the plea?" "If so, the issue is made out for the government:" *Held*, the illustration is unexceptionable: *State v. Dresser*, 54 Me.

NEGLIGENCE. See *Nuisance*.

NUISANCE.

Excavation in Highway.—If a private citizen be guilty of a nuisance in making an excavation in a public highway, he will be responsible for injuries arising therefrom during its continuance: *Portland v. Richardson*, 54 Me.

OFFICE AND OFFICER.

Tenure of Office—Construction of Penal Statutes.—An office is a public station or employment conferred by the government, and embraces the ideas of tenure, duration, emolument, and duties: *United States v. Hartwell*, 6 Wall.

Accordingly a person in the public service of the United States, appointed pursuant to statute authorizing an assistant treasurer of the United States to appoint a *clerk* with a salary prescribed, whose own tenure of place will not be affected by the vacation of office by his superior, and whose duties (though such as his superior in office should prescribe) are continuing and permanent, is an "officer" within the meaning of the Sub Treasury Act of August 6th 1846 (9 Stat. at Large 59), and, as such, subject to the penalties prescribed in it for the misconduct of officers: *Id*.

The terms employed in the 16th section of that act to designate the persons made liable under it, are not restrained and limited to principal officers: *Id*.

The admitted rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature: *Id*.

The penal sanctions of the 3d section of the Act of June 14th 1866, to regulate and secure the safe-keeping of public money, &c. (14 Stat. at Large 65), is confined to officers of banks and banking associations: *Id*.

Compensation for Expenses.—An officer, holding funds arising from the sale of goods attached, may deduct a reasonable compensation for the expense of keeping and selling the same, before applying the balance to the satisfaction of the execution, although the full amount of his charges is not taxed and allowed in the plaintiff's bill of costs: *Baldwin v. Hatch*, 54 Me.

The burden of paying such charges is upon the debtor and not upon the creditor: *Id*.

An officer is not bound by the taxation of his fees in a suit in which he is not a party: *Id*.

Aliter with a party: *Id*.

PARTNERSHIP.

Purchase by one Partner of the Interest of another with bond to indemnify.—If the plaintiff (one of the members of a firm including the defendant and others, each of whom purchased and held lands for the general objects of the copartnership) sell his entire interest in the partnership property, including the lands, to the defendant, taking back a bond reciting the sale, and conditioned to "save the plaintiff harmless from all the liabilities of said firm and growing out of said firm;" a judgment rendered against all the members of the firm, on a petition for partition of one not a member thereof, commenced before, but determined after such sale, and defended by an attorney retained by the defendant, in the name of all the members, is covered by the bond; and if the plaintiff pay such judgment, he will be entitled to recover the amount thus paid, in an action upon said bond: *Bunton v. Dunn*, 54 Me.

PAYMENT.

Delivery of Money by Debtor with specific Instructions as to its Application—Violation of Instructions by Creditor.—If the defendant, being cashier of a bank, receive, at the banking-house, a certain sum of money from the plaintiff, with instructions to appropriate it to the payment of a specific note signed by the latter, then undue, and he apply the same upon another note signed by the plaintiff, both of which are payable to said bank, and the plaintiff do not subsequently acquiesce in such application, the defendant will be personally liable in an action for money had and received to refund the sum thus received, with interest from the time when received: *Norton v. Kidder*, 54 Me.

And whether the defendant applied the money to his own use or to that of the bank is immaterial: *Id.*

The facts do not constitute a voluntary or involuntary payment: *Id.*

REPLEVIN.

Amount of Bond—Action on.—A replevin bond, in less than "double the value of the goods to be replevied," is good at common law: *Tuck v. Moses*, 54 Me.

If a plaintiff in replevin neglects to comply with the judgment for return, following an abatement of the writ, because of such defective bond, the defendant in replevin may maintain an action thereon, notwithstanding the writ was abated upon his motion: *Id.*

Against Express Company for not delivering Goods.—The owner of goods transported by an express company may, after tender of the sum legally chargeable against such goods, and after demand and refusal, maintain replevin therefor against the agent of such company having the care of the goods in one of the company's places of deposit: *Eveleth v. Blossom*, 54 Me.

When maintainable.—Replevin is maintainable only against a person having possession or control of the chattels to be replevied: *Ramsdell v. Buswell*, 54 Me.

SURETY.

Indulgence of Principal by Creditor with consent of Surety.—Where, in an action on a promissory note, by the payee against the principal and

surety, the plaintiff testified, and the surety in cross-examination admitted, that the latter requested the plaintiff "to wait on the principal as long as he could;" and subsequently the plaintiff gave the principal a written extension for one year: *Held*, that whether the delay granted was by the request or with the consent of the surety was a fact for the jury: *Treat v. Smith*, 54 Me.

A valid agreement for delay between the principal debtor and creditor will not discharge the surety, if made with his consent and approval: *Id.*

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THE

AMERICAN LAW REGISTER.

JUNE, 1868.

LIABILITY OF RAILROAD COMPANIES FOR NEGLIGENCE.

THE adjudicated cases in the United States, upon the liability of railroad companies for negligence, are far too numerous to be examined in detail within the limits of an essay. But the general principles applied by the courts are essentially the same in all the states, and it has been thought by the writer of the present article that a discussion of the most important rules which may be considered as established, although illustrated chiefly by reference to the decisions of a single state, will not be without interest and value to the profession generally.

A railroad corporation has relations to its employees, to its passengers, to the public generally, and to property. Its duties to the public may be considered with reference to adults and infants, and to them when at the crossings, and on the company's roadway. Its duties to property may be discussed in respect to the domestic animals, at crossings and on the company's roadway, and also in respect to real and other perishable property along its route.

The rights and duties of such a corporation as to its employees are determined by the law of master and servant. The company is bound to hire men who are fit for their business, and who are sober and tried. It is the right of each servant, that his fellow-servants should be able to discharge their duties, so that while he

is fulfilling his, he may not be imperilled by their incompetency. Passengers and the public have the same right. Hence it is that the company must answer for consequences resulting from the inefficient performance of the business of their employees.

The company engage, in law, to carry each passenger safely from his point of entrance to his point of exit. They must provide staunch and roadworthy carriages. They must have their track in good order and free from obstruction. They must provide convenient and easy means of access to and departure from their cars. The passenger, in turn, must comply with all reasonable regulations concerning his entrance into, his stay in, and his departure from the cars. Safe carriage is the paramount duty of the company. Hence they have a right to a free track as against all trespassers, and must keep a clear track for their passengers by the exercise of their utmost diligence.

The public are not entitled to occupy the roadway of the company except at the crossings, and then they must use reasonable despatch in crossing. The duty of care upon the company's servants and upon the public at intersections is mutual. Each has a right to expect this from the other. Therefore, in a city the company is bound to use all known and reasonable precautions to insure the safety of the public, such as the use of bells, steam-whistles, flagmen, gates, lights by night. The employment of any or all these must depend on the degree of public use of the highway. The public are bound to a diligence proportioned to the possible danger, and on warning given to stop. At all other places than crossings, the company is entitled to exclusive possession of their roadway, and any person on it without authority of law is a trespasser.

Off the crossings the company's servants have a right to presume that there are no trespassers on the roadway. They are not bound to look out for trespassers, except for the safety of passengers. If a trespasser is seen, the company's servants will not render the corporation liable except for wanton negligence. The obligations of care and diligence rest on the trespasser.

But in the case of a child of tender years the rule is different. Such a child lacks the capacity of exercising care. If left to go unattended, this is negligence in the parent and debars him from recovery. But the child is not barred. The company must exercise at crossings a diligence increased by the child's want of

capacity, and if, on the roadway, the child, though a trespasser, is seen, the engineer must use every practicable effort to stop.

Animals let loose and unattended are trespassers on the public road. Hence if injured at a crossing the company are not liable for anything but wanton negligence. But if attended, and traveling, and the attendant is not negligent, the company are liable for injuries done to them, if the result of want of care. What has been said of the duty of the company to the public at crossings, is predicable of its duty to animals also.

The company, as against the owners of animals, are not bound to fence. Hence cattle on the roadway of the company trespass, and the owner can recover only for wanton negligence. If injury accrues to the company, the owner is liable to it. A duty to fence or to take any other precaution, arises solely from the obligation to transport safely.

With respect to perishable property along the line of the route, such as woods, hay, lumber, buildings, the company are bound to use ordinary care. But care varies with circumstances. In dry weather ordinary care is a watchfulness much greater than in wet. The company are bound to use the best spark arresters as to have competent men to manage the fires of their engines.

Negligence is not doing what should have been done, or doing what should not have been done, in either case occasioning injury to another unintentionally. Where the measure or standard of duty is fixed, negligence is a question of law. Where the rule is a shifting one, the question is one of fact. Hence it is sometimes the province of the court to lay down what negligence is, at other times the jury alone must determine "what the standard is, as well as find whether it has been complied with."

It is law that a plaintiff whose negligence has assisted at all in causing the alleged injury cannot recover. Where the rule of duty is fixed and definite, it is usually the plaintiff's duty to show that he complied with it; and in such cases the burden of proving that he was not negligent falls on him. But where the standard shifts with the facts of each case, negligence must be proved by the party averring it. The plaintiff must always establish the alleged negligence of the defendant. The law will not presume it for him.

Where a rule of duty is fixed and clear, proof of what the plaintiff's conduct was will show at once whether he has or has

not complied with the rule, or, it will enable the court to ascertain and pronounce whether the plaintiff has or has not committed contributory negligence. But where the rule is not a fixed one, but the question is whether either party did as they should not have done, or did not do as they should have done, the proof of the conduct of the parties is at most evidence of negligence for the jury.

In *Ryan v. Cumberland Valley Railroad*, 11 Harris 384, it was ruled that where several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible. This rule was affirmed in *Frazier v. The Penna. Railroad*, 2 Wright 104; but the following exception was announced: that the company is responsible to an employee for the carelessness of another known by it to be unfit for his business.

The same principle is announced in *Caldwell v. Brown*, 3 P. F. Smith 453, 6 Am. Law Reg. N. S. 752, which, however, is not a railroad case, in these words: "An employer is not bound to indemnify an employee for losses in consequence of the ordinary risks of the business, nor of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

The rule, as stated, was adhered to in *Armstrong v. Catawissa Railroad*, 13 Wright 186, but not extended; it being held that where two companies used a road in common, a servant of the one was not a fellow-servant of the servants of the other; and the employers of the latter were responsible to the former for their carelessness. In *Frazier's Case* it was ruled that the exception was nullified, if the servant injured was aware of his fellow-servant's incompetency and made no complaint, and continued to serve with him. In *Lockhart v. Lichtenthaler*, 10 Wright 151, 4 Am. Law Reg. N. S. 15, it was held, that a brakeman in the employment of the owner of a private line of cars was not a servant of, but a passenger on the road furnishing the motive power.¹ *Penna.*

¹ Judge REDFIELD, commenting on *Railroad Co. v. Collins*, 5 Am. Law Reg. N. S. 274, claims that the master is responsible for any want of skill or care in respect of employing competent and trustworthy servants and in sufficient numbers; and also in respect of furnishing safe and suitable machinery for the work in hand, unless the servants knowing, or having the means of knowing of the deficiency in furnishing proper help or machinery, consent to continue in the employment. And the neglect or want of skill of the master's general agent employed in procuring help and machinery is the act of the master.

Railroad v. Zebe, 1 Wright 423, holds that a company is bound to have safe and convenient means of egress and regress to and from the line of the road. *Penna. Railroad v. Kilgore*, 8 Casey 292, and *Passenger Railway v. Stutler*, 4 P. F. Smith 375, hold that a company is bound to stop a sufficient length of time to allow all passengers whose destination is a given point to alight there. *Penna. Railroad v. Zebe*, 9 Casey 318, holds that the passenger must alight at the point and on the side provided by the company. These principles are illustrated by the opinion of WOODWARD, late C. J., in *Sullivan v. Phila. and Reading Railroad*, 6 Casey 238, who announces that, on the part of the passenger, his consent is implied to all the company's reasonable rules and regulations for entering, occupying, and leaving their cars, and if injury befall him by reason of his disregard of them, this is his own negligence concurring in causing the mischief. On the part of the company, the contract implies that they are provided with a safe and sufficient railroad to the point indicated; that their cars are staunch and roadworthy; that means have been taken beforehand to guard against every apparent danger that may beset the passenger, and that the servants in charge are tried, sober, and competent men. If in performing this contract a passenger not at fault is hurt, the law presumes negligence and throws on the company the onus of showing it did not exist. Their paramount duty is the passenger's safety.

But the company is not bound to place guards on the car windows; and if the facts are undisputed that a passenger was injured from putting his arm out of a car window, the court should pronounce him negligent as matter of law: *Pittsburgh and Conn. Railroad v. McClurg*, 7 Am. Law Reg. 277.

To this may be subjoined, by way of *in pari materia*, observations of Judge GIBSON in *Tenery v. Pippinger*, 1 Phila. Rep. 543, that "a carrier of passengers is bound to exercise the utmost care and discretion. He is answerable for the least possible degree of negligence or carelessness. The happening of an injury raises a presumption of want of care, and throws on the carrier the burden of disproving it."

But, as ruled in *Goldney v. Penna. Railroad*, 6 Casey 242, a contract, limiting the liability of a railroad as carriers, may relieve them from those conclusive presumptions of law which arise when the accident is not inevitable, and require that negli-

gence be proved against them. This ruling is maintained in *Powell v. The Railroad*, 8 Casey 414, and in *Henderson v. The Railroad*, 1 P. F. Smith 315.

At this point may be noticed a proposition of Judge GIBSON in *Tenery v. Pippinger*, *supra*. This case related to the rights and duties of passengers on a public stage, but, it is submitted, is applicable to railroads. "Passengers engage their passage on the basis of the customs of the country. These are incorporated with, and become a part of, the contract. It is matter of experience, I might almost say of general history, that our public stages have been crowded with as many passengers as they could carry. A railway company differs from a stage company, in its possession of an almost limitless motive power, and in its ability to attach to an engine a great number of carriages. There is, therefore, ordinarily no necessity for overcrowded cars, and the company would seem bound to take notice of the habits of the travelling public, and to provide corresponding accommodations." In *The Railroad v. Hind*, 3 P. F. Smith 517, WOODWARD, C. J., says, "To allow undue numbers to enter a car is a great wrong, and in a suitable case we would not hesitate to chastise the practice severely." Of course it is only possible to allude to first principles in this connection. In all cases arising under them, the rule of duty would vary with their special circumstances, and negligence would be for the jury pre-eminently. But it may be noticed that it was recently held in one of the New York courts, that, though the company had a rule forbidding its passengers to stand on the car platform, yet a passenger obliged to stand there from overcrowding the car and injured, could maintain his action equally with one seated within.

In *The Railroad v. Robinson*, 8 Wright 175, which was a suit brought by children for the death of their father, a pedestrian, alleged to have been occasioned by negligence of the company's servants in roping a coal-car into a private yard, the court approved the charge of HARE, J., in the court below, "that if a warning was given to the deceased, and was such as to convey knowledge of the state of the case and the danger to be incurred, and he went on with knowledge of his situation so derived, or derived from any other source, it was a bar to the action."

The Railroad v. Heileman, 18 Wright 60, was the case of one travelling in his wagon on the public road and injured by col-

lision at a crossing. The court say that at such an intersection neither the company nor the public have exclusive rights of passage. Their rights are concurrent. When the traveller approaches it, it is his duty to look out for approaching trains and engines. This is a fixed rule of duty. If he fails to take the precaution, his omission to perform his duty is negligence, and he cannot recover.

The obligations of the company are enforced in *Reeves v. The Railroad*, 6 Casey 461, where it is said that a person lawfully using a public road, which crosses a railroad at grade, has a right to presume that the servants of the company will take all reasonable and proper precautions to avoid injury to a person lawfully on the road. He is not bound to give a signal to an approaching train.

These principles were expanded in *The Railroad v. Evans*, 3 P. F. Smith 255. The plaintiff, who was entering Pittsburgh with his team when injured, "had a right to pass along the street across the railroad in pursuit of his usual avocations. On approaching the road it was his duty to look and listen for an approaching locomotive, and if he saw or heard one coming to get himself out of the reach of it. He had no right to stop on the railroad, nor so near it as to be struck by the engine or the train. If he might have heard or seen the train approaching, or if he saw it, and mistook the track it was on, it was negligence in him not to exercise his senses correctly and place himself out of danger. It was the right of the defendants to run locomotives on their road at the speed usual in cities and towns. In approaching grade-crossings, they are bound to give signals by a bell, a whistle, or head-light, or a flagman, or such other device as would be sufficient to give people of ordinary prudence notice of their approach. Any neglect of either of these duties would be culpable negligence, and if the accident resulted from such negligence on the part of both parties, neither could recover against the other."

It is said in *Railroad v. Norton*, 12 Harris 465, that because a company undertakes to carry its passengers safely it must have a clear track. If therefore a man places himself on the track, he must not expect the law to do more for him than to punish wanton injury. If he be injured from the ordinary pursuit of the company's legalized business, let him blame his own rashness and

folly. And in *The Railroad v. Spearer*, 11 Wright 300, it is said that if the engineer sees an adult on the roadway, where he has no legal right to be, and the train is in full view, and nothing to indicate a want of consciousness by the adult of the approach of the train, the engineer, having a right to a clear track, would be entitled to presume that the trespasser would remove in time to avoid danger, or if he thought the adult did not notice the train, it would be sufficient to whistle to attract his notice, without stopping the train.

The Railroad v. Spearer, 11 Wright 300, was the case of a child five years old suing by her next friend. In place of crossing at the intersection of the street, she went down about thirty yards upon the company's roadway. As she stood there a train passed her. An engine was following in close proximity. When the train got by, the child tried to cross the track before the engine could get to her, and was thrown down by it and mutilated. The court ruled in substance as follows: The child had no right to be on the roadway of the company. After the engine had got by the crossing, the engineer had a right, as against those not lawfully on the roadway, to expect it to be clear, and was therefore required to use only the ordinary care appropriate to his duties in that locality. But a child of five is not subject to the rule of contributing negligence like an adult. Upon seeing it, it would be the duty of the engineer to stop his train. The change of circumstances from the possession of a capacity in an adult trespasser to avoid the danger, to a want of it, would create a corresponding duty in the engineer. In the latter case, the child not concurring, for want of capacity, in the negligence causing the disaster, the want of ordinary care in the engineer would create liability. But if the train came unexpectedly on the child, or if it threw itself in the way of the train suddenly, the engineer being then incapable of exercising the measure of ordinary care to save it, the child would be without remedy, for the company's use of its track was lawful, and the child's presence there was unlawful.¹

¹ *Smith v. O'Connor*, 12 Wright 218, was the case of a child suing a wagoner for running over and injuring her in the public street. The court there ruled, that a child of tender years is held only to the exercise of that degree of care and discretion ordinarily to be expected from children of that age, and is not culpable for failing to exercise a prudence and care which belongs only to persons of riper years. But, intimated the court, the foregoing rule is applicable *only where the child sues*. If a parent sue for an injury by which the services of his

The principle was noted in *Glassey v. The Hestonville and Fairmount Passenger Railway*. In this case, recently decided by the Supreme Court of Pennsylvania, but not yet reported, it was held that it was contributing negligence in a parent knowingly to allow a child of four years of age to go about unattended in a public street of Philadelphia, and that he could not recover for the injury occasioned by the negligence of the Passenger Railway Company to his child.

In *The Passenger Railway v. Stutler*, 4 P. F. Smith 345, a strong distinction is taken between pure wrongs, such as seduction, or battery, and torts springing from a breach of contract; and it was held that in torts which consist in a mere omission of a contract duty, no legal remedy exists except an action on the case, which must be brought by the party injured, and cannot be by the master.

The suit was by a mother for injury done to her minor son, a *passenger*, by the negligence of a carrier.

These principles were inculcated in *The Railroad v. Skinner*, 7 Harris 298. A railway company is in exclusive possession of ground paid for as an incorporeal hereditament, and owns a license to use the greatest attainable rate of speed, with which neither the person nor the property of another may interfere. An American company is not bound to fence its railway. It is within the English rule, that the entry of another's cattle upon its possession is a trespass. The common law of Pennsylvania excepts from this rule only woodland and waste field. Hence, as regards any one except the owner of a forest or a waste field, the owner commits negligence in the very act of turning his cattle loose. If they are killed or injured on a railway, the owner has no recourse, but is himself liable for damage done by them to the company or its passengers.

The above rulings were amplified in *The Railroad v. Rehman*, 13 Wright 101, 5 Am. Law Reg. 49. Rehman's mules had escaped from a pasture adjoining the railroad, the fences of which were proved to be in good order. The court observes, "Whether, therefore, the plaintiff's mules escaped from an enclosed field or not, in view of the trespass on the defendants' road, I do not think makes any difference in this case. It was undisputed that they

infant son are lost, there would enter into the case, his duty to shield his child from danger, which is the greater the more helpless he is.

were on defendants' road without license. If so, they were there wrongfully—they were trespassers. How can the owner separate his case from the wrong done by his cattle? Intention, nay, effort to prevent, will not make their occupancy of the track lawful. He was bound to restrain them at his peril. He did not restrain them so as to prevent their being in the way of the defendants, and I see not how he can lawfully demand compensation in such an aspect of the case."

The company's obligation as carriers are enforced in *Sullivan v. The Railroad*, 6 Casey 236. As between the company and the passenger, the company are bound to see that the cattle are fenced out. If cattle are accustomed to wander on unenclosed grounds through which the road runs, the company are bound to take notice of this fact, and either by fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the train, or in some other manner, to secure the safety of the passenger. If they tolerate obstructions, they must avoid the danger by reduced speed and increased vigilance, or answer for the consequences.

In *Rehman's case*, *supra*, his loose mules were killed at a crossing. *Reeves v. The Railroad*, 6 Casey 454, was a suit brought for cattle killed at a crossing, which were attended. The drove numbered above three hundred. The drover when about thirty rods from the crossing was answered by an employee of the company that the train would be along in five minutes or so. He divided his cattle into sections, moved one across the track, and was moving a second when the train dashed into it at the rate of twenty-five or thirty miles an hour and killed several. The crossing was approached by the train through a cut and curve. For some half mile before coming to the cut, the turnpike was in full view of the engine, and the cattle stretched for that distance along the pike. The court say, "Duties grow out of circumstances. And in view of these circumstances, we have no hesitation in saying that it was the duty of the engineer to observe the cattle on the turnpike, and to presume that the head of the drove might be at the crossing, or so near thereto, as to make it prudent to moderate the rate of his speed in such degree as to give him entire control of the engine. This he was bound to do, and what he was bound to do the plaintiff had a right to presume would be done. And the measure of precaution taken or omitted by the plaintiff,

cannot be properly estimated without *allowing him the full benefit of this presumption*. If the rate of speed was under all circumstances, imprudent and unreasonable, the plaintiff was not only not bound to anticipate it, *but he had no right to presume that the company would violate their rule of duty*. Nor was it the plaintiff's duty to send a signal along the road. He had no right to be on the track himself except for the single purpose of passing along the turnpike. The company are bound to employ all necessary agents, to instruct them properly in their duties, and to look to *them* for the performance of every act which the business of the road requires. If the occasion required signals, it was the business of the company's agent who was at hand to give them."

The cases of *The Railroad v. Hummel*, 3 Casey 101, and *The Turnpike Co. v. The Railroad*, 4 P. F. Smith 345, furnish the principles determining the responsibility of railroads for firing perishable property along their lines of route. The first declares the general proposition of law, that railroad companies are liable at common law for the damage done by fire occasioned by the negligent management of their engines. The second avers that the degree of care has no legal standard, but is measured in every case by its circumstances. That which is ordinary care in a case of extraordinary danger, would be extraordinary care in a case of ordinary danger; and that which would be ordinary care in a case of ordinary danger, would be less than ordinary care in a case of great danger, which, to adopt Mr. Justice THOMPSON'S observation in *The Railroad v. McTighe*, 10 Wright 321, is an acute and active attention to the means of safety. Applying these principles to the case in point, which was a suit for a bridge set on fire by sparks from the railroad company's engine, the allegation being that there was not a proper spark-arrester, the court say: "If the construction was that which was best adapted for those purposes in known practical use at the time the alleged cause of action arose, the duty of the company was performed, nor should I look to entire uniformity in practice in a matter so difficult of accomplishment as this. I know no better proof of so difficult a problem than its practical accomplishment as far as it has been. When something certainly better is invented, and approved by the only true test of mechanical contrivances—practical experiment continued long enough to test its real utility—then railroad companies will be bound to use it."

There is not much light on the question on whom does the burden rest to prove the plaintiff's alleged negligence, when the defence is contributory negligence? In *Beatty v. Gilmore*, 4 Harris 463, the court below charged that the *onus probandi* lay upon the party averring the plaintiff's negligence. In error, the Supreme Court did not disaffirm the charge.

In *Railroad v. McTighe*, 10 Wright 320, THOMPSON, J., says, "I have no doubt there may be cases in which the plaintiff's case would be incomplete without proof of care; such, for instance, as where a prescribed mode of doing an act was required out of which the injury sprang, or where a party should leap from a train of cars to avoid a collision on well-grounded apprehension thereof. But if a party omit this, where it is not necessary to aver it in the *narr.*, and the other side do not demur, but go to the jury on the want of such element, or assume the burden of proof, he could not nonsuit the plaintiff or ask a court to do more than to submit the question to the jury, whether, from all the evidence, the plaintiff had been guilty of negligence or not.

In *Railroad v. Hagan*, 11 Wright 246, the court below was asked by the plaintiff to charge, *inter alia*, that "unless the jury are satisfied by affirmative evidence that the deceased did not use ordinary care, the plaintiff is entitled to recover." The court so charged, and the Supreme Court did not disaffirm it.

In *Myers v. Snyder*, Bright. Rep. 489, the question of contributory carelessness was raised. But the plaintiff was not required to show that he was not negligent. This is plain from the case, it being a suit by a newspaper carrier, who fell into a cellar-way about three o'clock in the morning of October 25th, and was there found by others.

With respect to the defendant's negligence, the burden of proof is of course on the plaintiff: *McCully v. Clarke*, 4 Wright 399, except where he is a passenger suing his carriers: *Sullivan v. Railroad*, 6 Casey 234.

A study of the foregoing cases will compel admiration for the excellent judgment and sound reasoning of the court which has virtually laid down a code respecting the rights and obligations of these corporations. The opinions consist so well, and are in many instances so luminous with principles, that they furnish the means of solving nearly all cases which can arise between pedestrians and drivers of vehicles in large towns or cities. Each of

these classes of persons has concurrent rights in the roadway of a street. But the rights of the former away from crossings are regulated by the fact that the vehicle is limited to the roadway, and has less facility of control, while the rights of the former at crossings are measured by the fact that these are the customary places of public passage. Hence a driver, either of a passenger railway car or of any other vehicle, is bound to approach an intersection at such a rate of speed as to have complete control of his vehicle. All drivers are bound to be watchful for the presence of persons in the roadway, and to exert a more active attention at crossings. If a little child is in the street, the burden of care falls on the driver. If an adult is there, and the driver is going at the rate of speed customary in cities and towns, he has a right to presume that the adult is exercising his requisite measure of care, and the adult has a right to presume that the driver will continue to approach at the lawful rate of progress. If a parent suffers an infant to go about unattended, this is negligence on his part, and bars his action; while if his child should occasion injury to a vehicle lawfully progressing on its legalized business, the parent would be responsible. And as to fire companies; it would seem they have only the same rights as others. They may proceed along the street at a rate customary to the roadway, and on approaching a crossing must moderate enough to have complete control of their apparatus. On arriving at the vicinage of the fire, their duty to extinguish and arrest the spread of the flames entitles them to obstruct the street to a degree necessary to the discharge of their duty. And if any appliances by which the obstruction could be mitigated should be devised, and used long enough to test their utility, it would be their duty to use them. It may be added that if a pedestrian observes fire apparatus, a vehicle, approaching at unlawful speed, he is bound to use care proportioned to the danger. He may not rush into peril, and claim that the unlawful movement of the vehicle creates a responsibility to him. Its responsibility in such a case would be to the criminal law in certain contingencies, and always to the municipality for breach of its police regulations.

T. B. D.

RECENT AMERICAN DECISIONS.

*Supreme Court of Michigan.*THE DAILY POST CO. v. DONALD McARTHUR.¹

DAILY FREE PRESS CO. v. SAME.

While those damages which depend on the sound discretion of a jury are not susceptible of any accurate regulation by the court, yet the jury should be prevented by proper caution from acting upon improper theories as to the legitimate elements to be considered in estimating them.

The term "exemplary or vindictive damages," should not be used without such explanation as may prevent a jury from being misled by it. For voluntary wrongs additional damages are allowed for injured feeling, but nothing beyond the individual grievance should be taken in account in estimating them.

If different agencies have concurred in producing a private grievance, the liability of each person for such portion of the damages as is allowed for injured feeling should be measured by the extent of his own misconduct.

While the mischief which may be caused by an abuse of the press is such as to render its conductors responsible for great care in guarding against the danger, yet the necessities of civilization require that no unreasonable or vexatious restrictions shall be imposed upon them.

The character and doings of private persons, not developed in legal proceedings or voluntarily made public, cannot properly be discussed in print; and for all libels, every publisher, whether an individual or a corporation, is responsible to the extent of any special damage, and any estimated damage to credit and reputation. But he is only liable for such damages to injured feeling as must inevitably be inferred from the libel itself, published in a paper of such character and circulation as his, if he has used such precautions as he reasonably could, to prevent such an abuse of his columns.

The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, should exempt a publisher from any aggravation of damages on account of the express malice of his subordinate, for any libel published without his privity or approval.

But if it should appear that he was wanting in reasonable care to prevent abuses, he would be liable to increased damages for his own misconduct, which might fairly be regarded as identifying him with faults which he took no pains to suppress.

ERROR to Wayne circuit.

This was an action for damages for the publication of an alleged libel concerning plaintiff.

The plea was the general issue with notice of justification.

¹ We are indebted for this case to Hon. J. V. CAMPBELL.—ED. AM. LAW REG.

Ward & Palmer, for plaintiffs.

William P. Wells, G. V. N. Lathrop, and William Gray,
for defendant.

Opinion by

CAMPBELL, J.—These cases come up on the same questions, the action below in each of them being for libel, and the charge in each having been identical in all its legal bearings.

The errors alleged refer to the rule of damages, which, it is claimed, was so laid down as to subject plaintiffs in error to be charged with exemplary damages, and this they insist was not authorized as the case stood before the court and jury. Their corporate character is relied on among other things as modifying and limiting their responsibility. It is not urged that a printing and publishing company engaged in the issuing of a newspaper and established for that purpose is not responsible to all persons injured by the publication of a libel. But it is claimed that those damages which are enhanced by the misconduct of individual agents of the company, stand on a different footing from those which might be recovered against the individual chiefly active in originating the slanderous article; and that, in submitting the case to the jury, sufficient care was not taken to discriminate.

It is not very easy to lay down definite rules for discriminating damages in those cases where they depend upon the sound discretion of a jury. And yet it is necessary to prevent the jury, as far as may be, from acting upon improper theories of what should be regarded, in estimating the elements which go to make up the injury to be redressed. When their attention has been carefully directed, their conclusions must be accepted, unless so perverse or mistaken as to be entirely inconsistent with justice.

The law favors the freedom of the press, so long as it does not interfere with private reputation, or other rights entitled to protection. And, inasmuch as the newspaper press is one of the necessities of civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious. But the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals, or voluntarily subjected to public scrutiny. And, since an injurious statement inserted in a popular journal does more harm to the person slandered than can possibly be wrought

by any other species of publicity, the care required of such journals must be such as to reduce the risk of having such libels creep into their columns, to the lowest degree which reasonable foresight can assure.

The danger and the precautions necessary to prevent it, are directly connected with the business itself; and all who voluntarily assume the responsibility must exercise it under similar conditions. It is the right of the citizen to be secure against all unlawful assaults; and no distinction can be reasonable which allows the care required in the conduct of any avocation, attended by risks to third persons, to be varied by the private or corporate character of its conductors. Any injury which is avoidable by the perpetrator—or, in other words, any injury which is not in some degree accidental—entitles the injured party to redress. And any damage to person or reputation is recoverable, to such extent as in the opinion of a jury, not led away by passion or prejudice, the nature of the injury will warrant.

But in all cases where an act is done which from its very nature must be expected to result in mischief, or where there is negligence so great as to indicate a reckless disregard of the rights or safety of others, a new element of damages is allowed to be considered. A serious wrong which is the natural and direct result of voluntary action, necessarily indicates a voluntary wrongdoer, for the law rigidly holds all persons to the presumption that they intend such results as are to be expected from their conduct, whenever those results arrive. Where the wrong done consists in a libel—which can never be accidental—the publishing is therefore always imputed to a wrong motive, and that motive is called malicious. And, in the absence of any testimony showing the origin and circumstances of the publication, it stands before the jury as a voluntary wrong, until palliated or excused, while the actual motive, whether intensifying or mitigating the moral guilt, may be shown to qualify it.

If evil motives arising out of ill will or revenge are shown, the moral guilt of the perpetrator will be very much enhanced. If such motives are negatived, the evil quality of the act will in like manner be reduced, and it will appear to all persons much less reprehensible.

It is in connection with the various degrees of blameworthiness chargeable on wrongdoers, that discussions have arisen upon the

subject of vindictive or exemplary damages, which, inasmuch as they rest upon actual fault, are by some authorities said to be designed to punish the wrong intent, while, according to others, the damages usually so called are only meant to recompense the sense of injury which is in human experience always aggravated or lessened in proportion to the degree of perversity exhibited by the offenders. While the term exemplary or vindictive damages has become so fixed in the law that it may be difficult to get rid of it, yet it should not be allowed to be used so as to mislead; and we think the only proper application of damages beyond those to person, property, or reputation, is to make reparation for the injury to the feelings of the person injured. This is often the greatest wrong which can be inflicted, and injured pride or affection may, under some circumstances, justify very heavy damages. In all libel cases this injury to the feelings is a proper element to be considered, in addition to the damage to reputation and other attendant grievances. And on the same principle anything having a tendency to reduce the extent of the voluntary wrong is to be considered in mitigation by the jury. The injury to the feelings is only allowed to be considered in those torts which consist of some voluntary act, or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances. It has been very wisely left to the jury to determine each case upon its own surroundings, because the only safe rule of damages in matters of feeling is to give what, to the ordinary apprehension of impartial men, would seem proportionate to an injury which must be measured by the instincts of our common humanity. And it will at once be perceived that where different persons or agencies have concurred in producing an injurious result, although all may be responsible for some damages for injured feeling, as well as for the more substantial mischiefs of another sort, yet they may stand in very different positions of moral wrong.

There is no doubt of the duty of every publisher to see, at all hazard, that no libel appears in his paper. Every publisher is therefore liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also for such damages on account of injured feeling as must unavoidably be inferred from such a libel, published in a paper of such a position and circulation. But no further damages than these should

be given, if he has taken such precautions as he reasonably could to prevent such an abuse of his columns. When it appears that the mischief has been done in spite of precautions, he ought to have all the allowance in his favor which such carefulness would justify, in mitigation of that portion of the damages which is awarded on account of injured feelings.

The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blameworthiness of a publisher to a minimum, for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling beyond what is inevitable from the nature of the libel. And no amount of express malice in his employees should aggravate damages against him, when he has thus purged himself from active blame.

If, on the other hand, it should appear from the frequent recurrence of similar libels, or from other proof tending to show a want of solicitude for the proper conduct of his paper, that the publisher was reckless of consequences, then he would be liable to increased damages, simply because of his own fault he had deserved them. By such recklessness he encourages fault or carelessness in his agents, and becomes in a manner in complicity with their misconduct.

While, therefore, in the present case, the reporters were guilty of carelessness in receiving hearsay talk of legal charges which could only be lawfully published if in accordance with the documentary facts, and while there could be no justification for publishing outside scandal against an individual, from any source whatever, yet the defendants were only responsible, beyond the damages recoverable under any circumstances for such a libel, to the extent of their own conduct, in the care or want of care used in guarding their columns against the insertion of such articles.

We have no means of judging whether the verdict of the jury was based upon any idea of the personal fault of the publishers, and we have no authority to pass upon its propriety in either view of the facts.

But there is room for the ground taken by the plaintiffs in error, that the charge of the court left it in the power of the jury to hold them in all respects identified with the faults of their

agents. Upon this ground we think the charge must be regarded as calculated to mislead the jury, and we must, therefore award a new trial.

Supreme Court of Pennsylvania.

FARMERS AND MECHANICS' NATIONAL BANK v. GIRARD
INSURANCE AND TRUST CO.

A sale under a writ of partition is a judicial sale, and discharges the lien of judgments and of a mortgage by one of the tenants in common of his undivided portion.

Such mortgage is discharged in Pennsylvania although it be a first mortgage and have priority of all other liens. The Acts of 1830 and 1845 only preserve the lien of such mortgage from discharge by sale under a *writ of execution*.

What irregularities in the proceeding for partition will not vitiate it.

CERTIFICATE from Nisi Prius.

The opinion of the court was delivered by

STRONG, J.—The question raised by this record is, whether the lien of the mortgage of Paul D. Geisse to the Farmers, and Mechanics' Bank, on his undivided third of the lot in dispute, was divested by the sale made by order of the District Court, in the action of partition brought by one of the tenants in common against his co-tenants? The plaintiffs contend that the lien of their mortgage was not disturbed by the sale, for two reasons. The first is, that the proceedings in the action of partition were so defective and irregular that in law they are a nullity as to the one undivided third mortgaged; and the second reason is, that it is not the law that a mortgage given by one of several tenants in common upon his undivided interest is discharged by a sale in proceedings in partition, instituted and duly conducted by one of the other tenants in common. It must be admitted that the proceedings in the action of partition, the effect of which is now under consideration, were in some respects irregular. Whether there was anything worse than mere irregularity—anything requiring us to hold that all the tenants in common were not bound by the action of the court, we will proceed to inquire. The plaintiffs insist that the District Court had not jurisdiction of all the parties, and particularly of the owners of that third

which had been mortgaged to them. At the time when the writ was sued out, the owners of the land were Augustus Henry Geisse, who owned one undivided third; Augustus H. Denckla, who held one-third as a trustee of Anna M. Everley; and Clara Geisse, a minor, who owned the other third subject to a life estate in her mother, Clara A., alleged to have been married to — Wilder. In the action, Augustus H. Geisse was the plaintiff, and the defendants named were Christian H. Denckla (afterwards amended by substituting Augustus for Christian), trustee of Anna M. Everley, — Wilder, and Clara his wife, and Clara Geisse, a minor. Service of the writ was accepted by Denckla, and as to the other defendants, the sheriff returned "*nihil habent*," and published as commanded once a week for six weeks," &c. By the express provisions of the 1st section of the Act of March 26th 1808, and the 4th section of the Act of April 11th 1835, this was an effectual service of the writ upon the defendants as to whom the sheriff returned "*nihil habent*," and it brought them within the jurisdiction of the court. It is a mistake to argue, as has been argued, that because Clara Geisse was a minor, under the age of fourteen years, service of the writ upon her could only be made by service upon her next of kin, as required by the Act of June 13th 1836, relative to real actions. The service spoken of by that act is personal. The requirement has no reference to cases where the defendants cannot be found in the county. Service in such cases is provided for by other Acts of Assembly. And in this case the legal effect of the sheriff's return is that there was no one in the county upon whom service of the writ against the minor could be made. Besides this, after the return, and after a declaration had been filed, setting forth the title of all the parties, the court expressly determined that it appeared service had been made according to the provisions of the Act of Assembly, and they gave judgment.

Again, it is objected that the writ did not designate — Wilder, the husband of the tenant for life, by any Christian name, and therefore that the publication of the substance of the writ could not have been notice to him or to his wife, or to the mortgagees, of her interest. It is to be observed that this objection is urged by a lien-creditor, and urged collaterally to the record. It is not made by any of the parties to it. But a lien-creditor is not entitled to notice of proceedings anterior to the sale of the

property on which his lien rests. Neither Wilder nor his wife ever complained that they were not parties to the record, and were not duly summoned to appear. It is useless to discuss the question how far third persons, who had no right to be heard in the case, can object to the omission of the Christian name of one of the defendants. Certainly they cannot, if the court had jurisdiction over the parties by any name, and, having such jurisdiction, gave judgment *de terris*. There is no analogy between misdescription of the names of parties in an action of partition, and misnomer of parties on a lien-docket. The effect of the latter is due to statutory requirement. A lien-docket is part of a system of statutes against frauds; but the substance of a writ of partition is notice to the parties in interest to appear. We hold, therefore, that the omission of the Christian name of Wilder, if he had one, did not prevent the court from obtaining jurisdiction over him and his wife, by the publication made by the sheriff.

Nor is there anything in the objection that the summons required only Christian H. Denckla (as amended Augustus H. Denckla) to appear. There are clerical errors in the writ; but the fair construction of it is that it was directed to all the tenants in common, except the plaintiff. The writ was so served. The court adjudged that service had been made upon all, and determined the interests of all, giving judgment that the part of each should be set out in severalty. We hold, then, that notwithstanding some faults and mistakes, which it is now too late for any of the parties to take advantage of, the District Court had jurisdiction of all the parties in interest.

The plaintiffs next object that there was no judgment "*quod partitio fiat*," which was a necessary pre-requisite to either partition or a sale. But this is a mistake. None was entered upon the appearance-docket until after the sale was made. The absence of such an entry does not disprove the existence of a judgment. One was entered upon the court minutes, and that is sufficient. The neglect of the prothonotary to transfer it to the appearance and lien dockets, at the time when it was entered, did no injury to the parties, nor to any person.

That the proceedings were not copied at length into the partition-docket, as required by the Act of April 25th 1850, it is hardly necessary to say, can have no effect upon the sale made

under the order of the court. It was not the purchaser's duty to see that they were transcribed, and he had acquired his title before the transcript could be made.

These are the principal objections urged against the validity of the proceedings in partition, as against the owners of the undivided third of the lot mortgaged to the plaintiffs. There are some minor ones, which have no weight. In view of them, we think that the proceedings in partition cannot now be successfully assailed, either by Mr. and Mrs. Wilder or Clara Geisse, much less by the plaintiffs, who are strangers to the record.

We come then to the more general question whether a sale in partition by writ discharges the lien of a mortgage on the undivided interest of one of the parties. A sale in partition is always for the purpose of enabling division. It is authorized only when it has been determined that the land which is its subject cannot be divided according to the command of the writ "without prejudice to, or spoiling the whole." When that appears the law directs a sale in order to convert that which is impartible, into an equivalent that is capable of distribution. Such a sale is eminently judicial, more strictly so than is a sale by a sheriff under an execution. It is made under an order of the court, its subject is in the hands of the court, and the proceeds are necessarily brought into court for distribution. The Act of 1799 requires that the moneys or securities, realized from the sale, "shall be brought into court," to be distributed. The whole proceeding is more directly the act of the court than in any other sheriff's sale, where the officer acts under instructions of the attorney, and where he may and often does distribute the purchase-money of the property sold without any supervision or direction of the court. That Orphans' Court sales in partition are judicial sales, was decided in *Sackett v. Twining*, 6 Harris 202, and recognised in *Jacobs's Appeal*, 11 Harris 477. I am not aware that it has been directly decided whether a sale in partition by writ in a common-law court is judicial or not, though *Allen v. Gault*, 3 Casey 473, substantially rules that it is. But without any positive determination, it is impossible to doubt that it is to be so regarded. It certainly has everything which in other cases is regarded necessary to make a sale judicial, and it is even less under private control than almost any other which is confessedly such.

Next it is to be observed that judicial sales in this state dis-

charge all liens. This is a rule of almost universal application. There are indeed some exceptions to it, created by express statutory enactment, and others growing out of the peculiar character of the lien or encumbrance, but it has long been regarded as sound policy, that property purchased at a judicial sale should pass into the hands of the purchaser clear of all mere liens. Exceptions to the rule are allowed only from necessity. If property be thus sold the chances are greatly increased that it will bring its full value, thus benefiting alike, the owners and lien-creditors. Sales in partition have never been recognised as exceptional, and it is not easy to discover any reason why they should be. In them it is as much for the interests of the owners of the land, and for holders of liens upon it, or parts of it, that purchasers shall not be compelled to look after encumbrances, as it is in any other judicial sale. And encumbrancers have the same notice that is given to them in ordinary cases of sales under a *venditioni exponas*. They have no reason to complain, therefore, if their liens be discharged from the land, and attached to its full equivalent, the proceeds of the sale. Surely a sale in partition should not be taken out of the general rule which regulates judicial sales, and their consequences, without some controlling reason. Exceptions are not to be multiplied unnecessarily.

There is a close analogy between proceedings in partition in the Orphans' Court, and proceedings in partition by writ. The object in both is the same, and the modes of accomplishment are not unlike. Yet there is no doubt that under an Orphans' Court sale in partition the entire interest of an heir passes to the purchaser, who takes it disencumbered of all liens. In *Commonwealth v. Poole*, 6 Watts 32, it was held that liens might be satisfied out of the proceeds of sale. This would have been impossible, had the sale in that case not worked an entire conversion. And the Act of March 29th 1832, though it did not expressly enact that sales in Orphans' Court partition shall divest liens, recognised that such must be the effect. The 49th section declared that, "in all cases where, in consequence of proceedings in partition, the share, or any part thereof, of an heir in real estate shall be converted into money, either by reason of the impracticability, or inequality of partition, or by virtue of a sale or otherwise, the Orphans' Court before making a final decree confirming the partition, or sale as aforesaid, may appoint a suitable person as

auditor, to ascertain whether there are any liens or encumbrances on such real estate, affecting the interests of the parties; and if it shall appear by the report of such auditor, or otherwise, that there are such liens, the said court may order the amount of money which may be payable to any of the parties against whom liens exist to be paid into court, and shall have like power as to the distribution thereof among the creditors or others as is now exercised by the courts of common law, when money is paid into court by sheriffs or coroners." In their remarks upon this section the commissioners to revise the Civil Code speak of it as an act of justice to possessors of encumbrances upon the interests of heirs in real estate, "which being converted into money by proceedings in partition, the security of the encumbrances becomes seriously impaired." If sales in Orphans' Court partition divest liens upon the interests of the parties, certainly sales in partition by writ must work the same result. It is impossible to find any reason for a distinction. None is found in the fact that the Act of 1799 allows the sheriff to take securities, instead of money, for the sum bidden at the sale, for he must bring the securities into court, where they are to be treated as a substitute for the land. Besides, it has been held that in some cases an Orphans' Court may decree a sale on time: *Davis's Appeal*, 2 Harris 371; *Bailey's Appeal*, 8 Casey 40. The court can deal with securities taken as with money.

It is worthy of notice that though the question before us has not been hitherto expressly decided by this court, the practice to distribute the proceeds of sale in common-law partition among lien-creditors of the parties has been partially sanctioned. In *Browne v. Browne*, 1 P. A. Browne's Rep. 97, it was assumed that in such a case the sheriff could not safely distribute the money among the parties without ascertaining what liens were upon the estate. There were judgments against some of the parties to the partition in that case, which the sheriff paid, or retained money to pay, and he was allowed for searches for judgments and mortgages. In *Willard v. Norris*, 1 Rawle 64, this court, remarking upon the case of *Browne v. Browne*, observed that "nothing could more clearly show how notorious is the rule that in every judicial sale in Pennsylvania, the land goes to the purchaser clear of all judgments and mortgages, and that out of the purchase-money, the sheriff, at his own risk, is to pay off all

these liens according to their priority, insomuch that though the Act of Assembly about partitions makes no mention of liens, yet by analogy, drawn from the notorious usage of the commonwealth, an allowance was adjudged to the sheriff for the fees paid for searches for judgments and mortgages, the owners of which might afterwards call upon him for their money."

In addition to this, the argument from the inconvenience of selling subject to encumbrances upon the interests of some of the parties is not without weight. In many cases it would render partition practically impossible. It would produce great difficulty and uncertainty in the distribution, and it would exhibit the anomaly of a right conferred by one tenant in common superior to that which he ever possessed. It is true some of these inconveniences may exist, even if encumbrances be discharged, as where there are ground-rents, or liens fixed by statute on the undivided interest of a party. Such are inevitable, but they present no reason for adding others not necessary.

For these reasons we hold that a sale made in partition by writ under the Act of 1799 does discharge the lien of judgments and mortgages upon the land sold, having the ordinary effect of other judicial sales. The consequence of this is that the lien of the plaintiffs' mortgage upon the undivided third of the lot in dispute was discharged by the sheriff's sale in partition, made in November 1853, and their purchase under a judgment subsequently obtained upon it, without notice to the purchasers at the former sale, gave them no title against them or those claiming under them.

We cannot yield assent to the argument that the lien of the mortgage was preserved by the Act of April 6th 1830, and its supplement of April 16th 1845. The first referred only to sales made by virtue of any writ of *venditioni exponas*, and the supplement extends the provisions of the act to all cases of sales made by virtue or authority of any writ of execution. The word execution has always been understood as meaning a writ to give possession of a thing recovered by judgment or decree. It is clearly distinguishable from a mere order of sale. The legislature doubtless intended to use the word in the sense in which it was commonly received. No one supposes that a first mortgage is not discharged by a sale under an order of the Orphans' Court. Yet an order of sale by the Common Pleas, in an action of parti-

tion, is no more an execution than is an order of sale for the payment of debts, or for partition in the Orphans' Court.

We need add nothing more. From what has been said it will sufficiently appear that in our opinion, there was error in giving judgment at Nisi Prius for the plaintiffs.

The judgment is reversed, and judgment is given on the point reserved for the defendants.

Supreme Court of Pennsylvania.

STERLING HOLCOMB v. KATE B. ROBERTS, ADMRX.

An administrator may sue for breach of contract made with his intestate, although the breach occurred after death of the decedent and before grant of letters of administration.

In cases where it is necessary for the purpose of supporting the rights of the intestate and for the benefit of his estate, letters of administration relate back to the death of the intestate.

WRIT of error to Common Pleas of *Warren county*.

The opinion of the court was delivered by

READ, J.—The plaintiff's intestate purchased from the defendant the oak timber on lot No. 135, in Pittsfield township, and paid him for it. In the spring of 1864, P. J. Taft, as the agent and by the authority of Kate B. Roberts, the widow of J. L. Roberts, the intestate, cut and made a considerable quantity of staves without objection by the defendant. But when he commenced to haul them to the Roberts mill, at Pittsfield, he was forbidden, and finally arrested on a *capias* in trespass, issued by defendant, and this prevented him from removing the staves.

Letters of administration on the estate of J. L. Roberts were issued to his widow, the plaintiff, on the 10th August 1864, and this suit was brought to recover damages for this breach of contract; and the first question is, can it be maintained by the administratrix, and does the grant of the letters of administration in this case relate back to the death of the intestate, and place her in the same condition as if she were an executrix?

The leading cases on this subject are our own case of *Leber v. Kauffelt*, 5 W. & S. 445; *Thorpe v. Stallwood*, 5 M. & G. 760 (44 E. C. L.); and *Foster v. Bates*, 12 M. & W. 226, cited

and approved in *Rockwell v. Saunders*, 19 Barb. 480, and *Priest v. Watkins*, 2 Hill 225.

An administrator may maintain an action of trespass for taking away the goods of his intestate after his death and before the grant of the letters of administration. "It would be strange, indeed," says C. J. TINDAL, "if an administrator might sue for a trespass committed in the lifetime of his intestate, and for one committed after the grant of letters of administration, but not for one committed in the intermediate time:" 5 M. & G. 773.

So where a person having sent a quantity of goods abroad for sale, died intestate, and after his death the defendants purchased the goods from the agent of the deceased there, who sold them for the benefit of the intestate's estate, and, subsequently to the sale, the plaintiff took out letters of administration to the intestate, and sued the defendants for the price of the goods, it was *held*, that the action was maintainable; that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so as to entitle the administrator to sue in *assumpsit* for goods sold and delivered; and that as the act of the agent was ratified by the plaintiff after he became administrator, it was no objection that the intended principal was unknown at the time to the person who intended to be the agent: 12 M. & W. 226.

So where a note belonging to the estate of an intestate was paid to his widow, who afterwards took out letters of administration, it was *held* they related back, and legalized the payment: 2 Hill 255. In *Leber v. Kauffelt*, Judge SERGEANT says: "There are cases in which, for the benefit of the estate, and to support the right, the law makes letters of administration relate back to the death of the intestate, so as to render the intervening acts done by the administrator valid and binding. The distinction, therefore, seems to be, that the relation back will be admitted for the purpose of supporting the rights of the intestate, and of ratifying acts for the benefit of his estate, and giving a remedy where otherwise there would be none."

These principles cover the present case, and the court were therefore right in negating the defendant's point, "that there can be no recovery unless it appears that after the granting of letters of administration he refused to permit the plaintiff to take the timber in accordance with the contract."

The two other specifications of error are to the charge of the court, in which we perceive no error under the circumstances mentioned by the judge.

Judgment affirmed.

Supreme Court of Indiana.

INDIANAPOLIS AND CINCINNATI RAILROAD CO. v. RUTHERFORD.¹

It is negligence for a passenger in a railroad car to allow his arm to project out of the window, and if he receive injury from such position he cannot recover.

The railroad company is not bound to put bars across its windows to prevent passengers from putting their limbs out.

APPEAL from *Morgan Circuit Court*.

Suit was brought by Rutherford against the company for injury done him, whereby his arm was broken, the elbow being projected at the time out of the car window. The train, in passing on a side track, was compelled to run close to a water-tank, and against one of the heavy timbers of this his arm struck, causing the injury. In the court below, the plaintiff obtained a verdict for \$700.

Oyler & Howe, for appellant.

The opinion of the court was delivered by

FRAZER, J.—[After disposing of some questions in regard to pleadings and instructions.]

The judgment cannot stand. Nothing is better settled than that in such a case, if the plaintiff's negligence has directly contributed to the injury, he cannot recover. A passenger is as much bound to use reasonable care to avoid injury, as the carrier is to use the greatest degree of skill and care to save the passengers from harm. Nor does the duty of the carrier extend to the imprisonment of the passenger, so as to prevent the latter, by his recklessness or folly, from voluntarily exposing himself to need-less peril. Though a passenger, he is nevertheless a free man.

¹ We are indebted for this case to Oyler & Howe, Esqs., appellants' counsel.—
EDS. AM. LAW REG.

Railway coaches are provided with windows to promote the health of passengers, by affording light and ventilation, and that the tedium of a journey may be relieved in some degree, and its pleasures enhanced, by viewing the objects along the route. The place for the passenger is inside, not outside, of the coach, and this is well known to everybody who ever saw a railway coach. The carrier is no more bound to barricade the windows to prevent passengers from extending their limbs outside, than he is to lock the doors to prevent them from going from car to car, when the train is in motion, and thus voluntarily subjecting themselves to the dangers obviously incident to that act of recklessness. The same reason which would require the one thing, would also require the other—nay, it is not easy to see why it would not require that the passenger should be so restrained of his liberty in every respect that he could not by any act of his own, put himself in unnecessary danger. Such a power in railroad officials must exist, if the duty to exercise it exist. The obligation to answer in damages cannot be separated from the authority to do what is necessary to avoid liability. The law recognises no such duty as resting upon carriers of passengers, nor have they any authority to exercise such unreasonable and annoying power over those whom they carry. Their passengers are not their slaves, nor are the latter absolved from the duty of using ordinary care for their own safety. Unwarranted, officious, and insulting interference with the liberty of passengers by railroads had proceeded in this state to such a point, that the legislature, at its last session, deemed it necessary to interfere, and impose severe penalties to prevent one form of the annoyance: Acts of 1867, p. 165.¹

The proposition put forth by the court below for the guidance of the jury, that it is the duty of the carrier to barricade coach windows, &c., finds some sanction in *The New Jersey Railroad Co. v. Kennard*, 21 Penn. St. 203; but it is so entirely at variance with the weight of authority, and with elementary principles, that we cannot recognise it as good law. *Holbrook v. Schenectady Railroad Co.*, 12 N. Y. 236, is also relied upon by the appellee as sustaining the court, but in our opinion that case is very far from it. There was a controverted question whether the plaintiff's arm was inside or outside of the car when the injury

¹ This refers to the locking of car-doors while the train is in motion.—*Ens. AM. LAW REG.*

occurred. The court below had charged the jury that the railroad company only contracted to carry the passenger safely, provided she kept within the cars—that it was for the jury to say whether her elbow was out of the cars at the time it was injured; and if it was, then it was a fact from which they might infer want of ordinary care on her part. The defendant had moved the court to instruct that if the jury found that the plaintiff's arm was outside the window when the injury was received, it was an act of negligence, and she could not recover. The chief question in the Appellate Court was whether the refusal of this instruction was error. That it was a correct statement of the law was not questioned in the Court of Appeals, either in the argument or in the opinion of the court. Indeed, the opinion is quite to the contrary; but there was held to have been no error in its refusal, for the sole reason that the lower court had charged the jury substantially in accordance with the request, and was right in declining to repeat it.

It cannot be necessary to cite authorities in support of the views upon this subject already announced in this opinion. We content ourselves with a reference to *Todd v. The Old Colony Railroad Co.*, 3 Allen 18, and *The Catawissa Railroad Co. v. Armstrong*, 49 Penn. St. 186, for a clear and forcible statement of the law upon the subject as it has been long settled.

Judgment reversed, with costs. Cause remanded for new trial.

In *Pittsburgh, &c., Railroad Co. v. McClurg*, ante, p. 277, the Supreme Court of Pennsylvania having occasion to consider the same point, came to the same view of the law, as the court in the preceding case, and expressly overruled the case of *New Jersey Railroad Co. v. Kennard*, 9 Harris 203, which had decided differently.

J. T. M.

Supreme Court of Illinois.

COLE v. VAN RIPER.

The Illinois Statute of 1861 giving a married woman exclusive control of her property, declaring that the same shall "be held, owned, possessed, and enjoyed by her, the same as though she was sole and unmarried," and exempting it from execution or attachment for the debts of her husband, does not give to her the

power of conveying her real estate without the consent of her husband manifested by joining in the deed.

Although the effect of the statute is substantially to abolish the life estate of the husband in his wife's lands, during their joint lives, accruing to him by virtue of the marital relation, and also to abolish, during the life of his wife, his tenancy by the courtesy in her lands, in all cases where the title has been acquired by her since the passage of the statute, it does not abolish the tenancy by the courtesy after the wife's death, but leaves it unimpaired in the husband.

THIS was an action of ejectment, and the question presented by the record was, whether, under the law of 1861, known as the Married Woman's Act, a married woman can convey real estate, acquired since that time, without the joinder of her husband.

That act provides :

"That all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married, owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith, from any person other than her husband, by descent, devise, or otherwise, together with all rents, issues, increase, and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her, the same as though she was sole and unmarried ; and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

The opinion of the court was delivered by

LAWRENCE, J.—The legislature has here used very sweeping language, but it must be interpreted with reference to the evil intended to be cured, and in such manner as to be made to harmonize with other statutes which are left unrepealed, so far as such harmony can be secured without disregarding the legislative intent. It is a familiar maxim, that repeal by implication is never favored.

That this statute cannot be enforced, according to its literal terms, without impairing, to a very large extent, the strength of the marriage tie, will be evident on a moment's reflection. By the terms of the act the property of a married woman is to be "under her sole control, and to be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried." If this language is to receive a literal interpretation, a married woman, living with her husband and children, in a house owned by her, would have the right to forbid her husband to enter upon the premises, and he would be a trespasser in case he should enter against her will, and would be liable to her in damages. Such

would be her rights as a *feme sole*. The wife could thus divorce her husband *a mensa et thoro*, without the aid of a Court of Chancery. Or, again, suppose in a house thus owned and occupied, the furniture is also the wife's property, can she forbid the husband the use of such portion as she may choose, allow him to occupy only a particular chair, and to take from the shelves of the library a book, only upon her permission? This would be all very absurd, and we know the legislature had no idea of enacting a law to be thus interpreted. It is simply impossible that a woman married should be able to control and enjoy her property as if she were sole, without leaving her at liberty practically to annul the marriage tie at pleasure; and the same is true of the property of the husband, so far as it is directly connected with the nurture and maintenance of his household. The statute cannot receive a literal interpretation.

The object of the legislature was not to loosen the bonds of matrimony, or create an element of constant strife between husband and wife, but to protect the latter against the misfortunes, improvidence or possible vice, of the former, by enabling her to withhold her property from being levied on and sold for the payment of his debts, or squandered by him against her wishes.

Before the passage of this law, the husband became the owner, by virtue of the marriage, of the personal property held by the wife at the date of the marriage, or which came to her after that time, and was reduced by the husband to possession, and he was also seised of an estate, during coverture, in lands held by the wife in fee. This estate was in the eye of the law a freehold, as it would continue during their joint lives, and might last during his life, and was liable to be sold on execution against the husband: 2 Kent 136. The personal property reduced to possession, and this estate in the wife's land, were at the disposal of the husband, and liable to be sold at his pleasure, for his own use, or to be levied upon and sold by his creditors. These were the evils which the law was designed to cure and has cured. Although we held in *Rose v. Sanderson*, 38 Ill. 247, that where the husband's estate in the wife's lands had vested before the passage of this law, it was not divested by the act, and might be sold by his creditors, yet where the marriage has occurred, or the land has been acquired by the wife since that time, it would, doubtless, be held that this species of estate, known as an estate during coverture,

has been substantially abolished, because its existence is wholly irreconcilable with both the language and the objects of this law. But besides this estate which the husband acquired, by virtue of the marriage, in the lands of his wife, he also, if there was issue of the marriage born alive, became tenant by the *courtesy* of all lands of the wife which such issue might, by possibility, inherit; and this estate, unlike the other, terminated only with his own life. The law termed this estate *initiate* on the birth of issue, and *consummate* only on the death of the wife; but the *initiate* estate could be seized and sold on execution against the husband. Up to the period of the wife's death, it was substantially the same thing as the estate during coverture above mentioned. Now, although this estate is greatly modified by the Act of 1861, it is not totally destroyed. During the life of the wife, the husband can exercise no control over his wife's lands as tenant by the *courtesy*, nor has he an interest in them subject to execution. We refer, of course, to lands where no interest had vested before the passage of the law. This estate, then, would be totally abolished, like the estate during coverture, were it not that tenancy by the *courtesy* continued after the wife's death, and indeed at that period became most material to the husband, since, up to that time, he had the enjoyment of his wife's realty by virtue of the other species of estate. While, then, the one estate is annihilated by a necessary implication, the utmost that can be said in regard to the other is, that it is materially modified. This estate is as old as the common law. It has always been recognised as existing in this state. It is not expressly abolished by the Act of 1861, and, so far from being abolished by implication, it may be recognised as taking effect on the death of the wife, without conflicting, in the slightest degree, with the letter, spirit, or object of that law. On the contrary, the law itself provides, that it is "during coverture" that the property of the wife is clothed with these new qualities, thus leaving the existing law unchanged, as to the disposition of the wife's property at her death. Moreover, it is hardly to be supposed that the legislature would totally abolish this estate, without remodelling that of dower; or that they would work so important a change in our law of realty, merely by implication. But, in fact, there is not even an implication that affects this estate after the death of the wife.

We have said this much in regard to this estate, as a foundation.—31

tion for our opinion that this act does not enable the wife to convey her land without the consent of her husband manifested by joining in the deed.

At common law the wife could only convey by fine or a common recovery, and a fine levied without the husband was not binding upon him: 2 Kent's Com. 150. A conveyance in which the husband unites has been substituted in this country, and is the mode pointed out by the 17th section of our statute of conveyances. The estate of the husband in the wife's lands could not therefore be destroyed or impaired by the sole act of his wife. If this section of our Conveyance Act is repealed by the Act of 1861, it is repealed by implication, which, as already remarked, the law does not favor. But where is the implication? Not certainly in the language of the act, which gives the wife the right to hold, own, possess, and enjoy her property, for these terms give only the *jus tenendi*, and not the *jus disponendi*. The power to own and enjoy, is entirely different from the power to dispose of, and the latter is not necessary to the exercise of the former. Neither is the power of disposing implied in that phrase of the law directing that her property shall be under her sole control, because that term, although indefinite, must be construed in connection with the terms, "own, hold, possess, and enjoy." In order that she may hold and enjoy, she must necessarily control. But the control of the use and enjoyment does not imply the power to sell. Strictly speaking, the land, when conveyed, would pass away from her control and enjoyment.

But the chief reliance seems to be placed on the provision that she is to have the power of controlling and enjoying as if she were sole and unmarried, and hence it is contended that she can convey as if she were sole, and her deed would have the same effect as the deed of a *feme sole*. If she can convey at all, because of the language in the act referring to the condition of a *feme sole*, her deed would undoubtedly have this effect, and would thus destroy the husband's estate by courtesy, and prevent him from recovering possession of the lands conveyed after her death.

We have already given the reason why this act does not annihilate the estate of a tenant by the courtesy, or place it in the power of a wife to destroy it. If we are right in that conclusion, it necessarily follows that it was not the intention of the

legislature, when they gave her the power to enjoy as a *feme sole*, to give also the right to convey as a *feme sole*, and thereby destroy the husband's estate.

There is another reason for not holding that this act enables the wife to convey by her own deed. Before the passage of the law, acts similar in their general character had been passed in several of our sister states. The law of New York expressly gave the wife the power of conveyance.

The laws of Pennsylvania and New Jersey did not, but employed terms of the same general character as our own. Our legislature chose to shape our law after the latter models. It is but a just inference that the omission of any words, in our act, expressly giving the power to convey, was the result of design, and not of accident.

The Supreme Courts of Pennsylvania and New Jersey have given to the acts of those states the same construction adopted in this opinion: *Walker v. Reamy*, 36 Pa. State Rep. 410; *Waylor v. Field*, 5 Dutch. 287.

We should add, in conclusion, that we have not considered the question of the power of the wife to dispose of her personal property. That may depend upon different considerations. The power to sell has sometimes been considered a necessary incident to the ownership of personal property.

But a majority of the court are of opinion that the Act of 1861 does not authorize a married woman to convey her realty in any other manner than that pointed out by the Statute of Conveyances. In holding this, however, we do not question the rule laid down in *Emerson v. Clayton*, 32 Ill. 393, as to the right of a married woman to bring a suit in her own name. That right is a necessary incident to the law.

As the decision of this question disposes of this case, it is unnecessary to consider the other questions raised. The judgment is reversed, and the cause remanded.

BRESE, C. J., dissents.

*United States District Court, Northern District of New York.***MATTER OF LUTHER SHEPARD, A BANKRUPT.¹**

A debt against a bankrupt's estate may be proven before a United States commissioner, although the bankrupt and creditor both reside in the same judicial district.

A debt barred by the Statute of Limitations of the state in which the bankrupt resides may still be proven against his estate in bankruptcy.

A creditor who, after making his deposition to prove his debt, retains possession of the deposition and does not allow it to pass into the hands of the assignee in bankruptcy, is not a creditor who has proven his debt.

Any creditor of a bankrupt may oppose the discharge, whether he have proven his debt or not.

THIS case came on to be heard upon the petition of the bankrupt for "a full discharge from all his debts, and a certificate thereof."

At the time fixed for showing cause against the discharge two of the bankrupt's creditors, whose debts were set forth in the schedules annexed to his original petition, entered their appearance, and proposed to contest his right to a discharge; whereupon, it was objected that they were not "*creditors who had proven their debts*," and, consequently, had no right to be heard.

It was also insisted that the alleged debts, which such creditors had attempted to prove, were barred by the Statute of Limitations of New York, where such debtor and creditors resided; and that, such alleged debts being so barred by the statute, the parties appearing were not creditors, and had no right to contest the bankrupt's discharge.

It was conceded that a deposition in proper form for the proof of the debt of one of the creditors had been made before a commissioner appointed by the Circuit Court, and that such deposition had been duly transmitted to the assignee; but it was insisted that the commissioner had no authority to take proof of such debt, inasmuch as the creditor was, at the time, a resident of this judicial district.

George Gorham, for the bankrupt.

E. W. Gardner, Jr., for the creditors.

¹ We are indebted to Hon. N. K. HALL for this case.—EDS. AM. LAW REG.

HALL, D. J.—I. The question presented is not free from doubt. The 22d section of the Bankrupt Act declares “that all proofs of debts *against the estate of the bankrupt*, by or in behalf of the creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident creditors before any register in bankruptcy in the judicial district where such creditors, or either of them, reside, or before *any* commissioner of the Circuit Court authorized to administer oaths in any district.”

There is, in the language of this provision, no clear indication that Congress intended that the right to prove their debts before a commissioner should be confined to creditors not residing within the judicial district in which the proceedings were pending. The sentence is punctuated by commas only, so that we have not even the indication of that intention which would have been given if a semicolon, instead of a comma, had been inserted after the words “said district;” but on the other hand there is not the indication of a different intention which would have been given if a semicolon, instead of a comma, had been inserted after the word “reside.” So far as the punctuation, the particular language, or the grammatical construction of the sentence furnishes any evidence of the intention of Congress in respect to this question, it is more favorable to the construction which would sustain the authority of the commissioner in this case than to the opposite construction; for the concluding portion of the sentence is, in these respects, as closely connected with the first portion of the sentence as with the second or middle portion. It is true that the concluding portion of the sentence is separated from the portion of it which provides for the proof of debts by resident creditors, but this separation furnishes no reliable evidence that Congress intended to deny to resident creditors the right to prove their debts before a commissioner, for the connection of the three provisions in one sentence necessarily required that the interposition of those placed first and last should be separated by the other.

The intent to require all proofs made before registers to be taken before a register of the judicial district in which the creditor resides, is clearly expressed; and it is probable that the concluding lines of the sentence, which authorize proof before commissioners, were added by way of amendment,—perhaps by

another hand,—without a careful consideration of their import when connected with the preceding provisions. The difference between the concluding provision and the two preceding ones, is strongly marked. In the first two of these provisions the authority of the registers is expressly limited by the words “in said district,” in the one case, and by the words “in the judicial district where such creditors or either of them reside,” in the other; but no words of limitation are found in this concluding provision. On the contrary, there are very clear indications that this provision was intended to be more general and comprehensive; for the unlimited term *any* is twice used, first in reference to the commissioner, and again in reference to the district. If it was not intended to give a creditor residing in the judicial district where the proceedings are pending, the right to prove his debt before a commissioner, it would seem that the right would have been limited by the use of the words “in said district,” at the conclusion of this sentence, as had been done in the first clause; but instead of this the general words “in any district,” are used. And these words, which conclude the sentence, can have no legal effect unless they are held to give the alternative right to resident as well as to non-resident creditors. If the words “in any district” had been omitted, this right would still have been clear as to non-resident creditors, though more doubtful than it now is in respect to creditors residing within the judicial district where the proceedings are pending. This alternative right to prove debts before a commission, was doubtless conceded for the convenience of creditors; and the reasons of convenience which required it to be extended to non-resident creditors equally required its extension to resident creditors also. So far as the convenience of the creditor is concerned, it is immaterial whether the debtor’s petition is pending in the judicial district in which the creditor resides or in another district.

If it be suggested that Congress may have desired to secure to the registers, rather than to the commissioners, the fees for taking such proofs, the ready answer is, that if such a desire was allowed to influence the action of Congress in respect to resident creditors, it is impossible to assign any satisfactory reason for limiting its influence to the case of resident creditors, instead of extending it to both resident and non-resident creditors.

These considerations seem to require that the provisions of the

statute should be so construed as to give this alternative right to resident as well as to non-resident creditors. And I adopt this more willingly, as a different construction would invalidate the proof of many debts taken in good faith before commissioners, when the creditors were residents of the district in which the proceedings were pending ; for the more liberal construction has been frequently, if not generally, given to this provision by registers and commissioners, as well as by practitioners in bankruptcy. Indeed, in the present case, it was shown by affidavit that the proof was made before a commissioner, under the advice of the register having the case in charge, that the creditor, though resident in this district, might make proof of his debt before a commissioner as well as before the register.

The proof referred to will be held sufficient, and the creditor regarded as one who has proved his debt and is entitled to oppose the discharge.

II. Before reaching the conclusion just stated, I have necessarily considered the objection that the debts of the opposing creditors were barred by the New York Statute of Limitations. This statute (like the Statutes of Limitations of most of the states of the Union) does not, in terms, provide that the debt shall be extinguished by the lapse of time required to constitute the statute a defence to an action brought in the courts of New York, and it is a good defence only when specially set up by answer as a defence to an action brought in this state. The statute, therefore, simply affects the remedy, and it leaves the creditor at liberty to pursue in another state any remedy authorized by the laws of that state.

It is believed that in some of the states, as in Iowa (Code of 1850), Indiana (Civil Code, 1852), and in Ohio (Rev. Stat., 1854); it is provided by statute that actions shall not be brought on demands barred by the Statutes of Limitations of the states where the cause of action arose ; and in some states the statute may, in terms, provide that the debt shall be extinguished by the lapse of time ; but the statute of this state contains no such provision, and it does not purport to extinguish or destroy the debt ; and such is doubtless the case in all, or nearly all, of the states of the Union.

That the operation of such statutes does not annul or extinguish the debt, but only affects the remedy, and that such statutes

have no effect out of the state in which they are passed, will sufficiently appear upon an examination of the following authorities:—

Rawls v. Am. Life Ins. Co., 36 Barb. 357; *McElmoyle v. Cohen*, 13 Peters 312; *Townsend v. Jemison*, 9 How. 407; *Gans v. Frank*, 36 Barb. 320; *Power v. Hathaway*, 42 Id. 214; *Rugles v. Keeler*, 3 Johns. 263; *Bulger v. Roche*, 11 Pick. 39; *Dwight v. Clark*, 7 Mass. 515; *Decouche v. Savetier*, 3 Johns. Ch. Rep. 190; *Lincoln v. Battelle*, 6 Wend. 472; *Byrne v. Crowningshield*, 17 Mass. 55; and *Medbury v. Hopkins*, 3 Conn. 472.

And see *Olcott v. Tioga Railroad Co.*, 29 N. Y. 210; 1 Kent's Com. (10th ed.) 261, 262, and notes; and Story's Conflict of Laws, §§ 576, 577, 582.

The debt then exists, and in most of the states of the Union an action can be sustained against the debtor, if found within their jurisdiction. This right of the creditor, considering the migratory habits of our people, and their known propensities to travel from state to state, is a valuable right which would be barred by the discharge; and I shall concur in the opinion of my learned brother of the Southern District upon this question (*Matter of Kay*, ante p. 283), and hold that the fact that this creditor's remedy for his debt, by suit in New York, is barred by the Statute of Limitations, does not prevent the proof of such debt, or bar his right to oppose the discharge of the bankrupt.

It must be conceded that the question is not free from embarrassment, and that it has been differently decided by the learned judge of the Massachusetts District (*Re Kingsley*, ante p. 423), who relied, in part at least, upon the English decisions. In that country it has been settled, after much conflict of judicial opinion, that a debt barred by the English Statute of Limitations is not provable in their bankruptcy courts: *Ex parte Dawdney*, 15 Ves. 498; 1 Christian's Bankruptcy 221, and notes; but the circumstances under which the question was decided there are very different from those under which it is presented here. Their Statute of Limitations and their Bankruptcy Act exist by the same legislative authority, and the operation of the statute is, territorially, co-extensive with the proper force and operation of the Bankruptcy Act; but in the United States statutes of limitations have no effect beyond the territory of the single state

which enacts them ; while a discharge in bankruptcy, under the laws of the United States, operates with equal force in every state of the Union.

The English Statute of Limitation operating throughout the whole of England, and it being there held that a foreign creditor (one whose debt was contracted and to be paid elsewhere than in England, whether in the United States, France, Germany, or an English or foreign colony) would not, even when suit for its collection was brought in an English court, be barred by a discharge in bankruptcy granted in England, unless the foreign creditor voluntarily made himself a party to the proceeding (Eden on Bankruptcy 422, 423 ; *Smith v. Buchanan*, 1 East 6) there is much reason for the adoption of the English rule there which does not apply here.

Our own courts hold that a bankrupt discharge in a foreign country does not discharge a debt made in and with reference to the laws of this country : *Green v. Sarmiento*, Peters C. C. Rep. 74 ; *Zanie's Case*, 1 N. Y. Leg. Obs. 40, note, agreeing in this respect with the English doctrine.

It may also be conceded that the propriety of allowing debts barred by the statute to be proved in bankruptcy may be opposed by much force of argument, by reason of the apparent injustice of allowing it in particular cases ; but, on the other hand, arguments of at least equal force may be urged against the opposite rule. In respect to questions arising under statutes of limitations, the *lex fori* prevails, and if the statutes of the state in which the bankruptcy proceedings are pending are to furnish the rule of limitation, the New England creditors, by simple contract of a bankrupt who has resided in this state for five years, or for only five months, may prove their debts of twelve years' standing, when, if he had not changed his residence, they would not have been provable ; and a bankrupt who resided and was largely indebted to relatives in New Jersey, where the Statute of Limitations would be a good bar, might carry on business for four months in the city of New York and then present his petition in bankruptcy there, and allow all his New Jersey creditors whose debts were barred by their Statute of Limitations to prove their debts. Again, the states may at any time modify their statutes of limitations ; and if the state of Wisconsin or Virginia should provide by statute that no action for any debt, or for any debt

due to a resident of another state, should be maintained after six months from the time the cause of action accrued, would the act be binding upon the United States Bankruptcy Courts? Or if a state should pass an act that no debt should be proved in bankruptcy proceedings in that state after the expiration of six months from the time the debt accrued, would the Bankruptcy Courts regard such an act? The adoption of the Statutes of Limitation of the particular state in which the proceedings in bankruptcy are pending, would in many cases give the bankrupt the power to determine whether the statute should or should not be a bar by remaining a resident of the state where he had long resided, and whose Statute of Limitation would be a good bar, or by removing to and making his application in another state, where the statute would be no bar.

But it is unnecessary to pursue this line of argument. The real question is, whether a debt against which the Statute of Limitations of this state has run is still a debt, and that it is there can be no doubt. If it is still a debt, there is no statute of the state or of the United States which provides that it shall not be proved or allowed in proceedings in bankruptcy; and until some statute of limitations shall be adopted by Congress for the guidance of courts of bankruptcy, no uniform or satisfactory rule of limitation can be applied by those courts. And even if they could devise a uniform and satisfactory rule, I can find no authority for those courts to provide, or adopt from the statutes of the state, any such rule of limitation.

III. In respect to the claims of the other opposing creditor, it was shown that he had appeared before the register having this case in charge, and had made a deposition, drawn up by the register himself, in the proper form for the proof of such creditor's debt, but that such deposition had been retained in the hands of the creditor or his attorney, and had never been delivered or sent to the assignee. It also appeared that the creditor had afterwards commenced a suit against the bankrupt for the purpose of obtaining a judgment in a state court for the amount of his debt, and had retained possession of the deposition referred to until it was filed with the clerk at the time of entering his appearance in opposition to the bankrupt's discharge. It was insisted, upon this state of facts, that the court ought not to allow the creditor to oppose the bankrupt's discharge.

The 22d section of the Bankrupt Act, after prescribing the manner and form of making the proof of a debt by deposition, further provides as follows: "If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept for that purpose, the names of creditors who have proved their claims," &c. ; and it is evidently the intention of the act that the register or commissioner taking the proof shall decide, in the first instance, upon the sufficiency of the proof. If the proof is satisfactory, the officer is to deliver it to the assignee, or send it to him by mail ; and this act of the officer is the only evidence that the proof is satisfactory which has been provided for, either by the statute or the general orders and forms prescribed by the justices of the Supreme Court. The return of the deposition to the creditor, when entirely unexplained, would seem to indicate that the proof was not satisfactory ; or else that the creditor did not intend to complete his proof and become thereby a "creditor who had proved his debt;" and the subsequent act of the creditor in commencing a suit against his debtor (which, under the 21st section of the act, he had no right to do if he had proved his debt) is *prima facie* evidence that the proof was not satisfactory to the register, or else that the creditor did not intend, by making the deposition, to become a creditor who had proved his debt.

Under the circumstances stated, I am of the opinion that the creditor, who has now filed the deposition with the clerk, cannot be considered as "a creditor who has proved his debt," within the technical meaning of those terms as used in the Bankrupt Act.

IV. If this conclusion is correct, the question arises whether a person who shows, by affidavit or otherwise, that he is a creditor of the bankrupt, has a right to appear and oppose his discharge without being, in technical strictness, "a creditor who has proved his debt?"

This question is one of great importance and in respect to which there is much difference of opinion. It was stated on the argument that the learned judge of the Southern District of New York had decided against this right ; and I am aware that others, whose opinions are entitled to great respect, have expressed similar

opinions. It is probable that in making his decision Judge BLATCHFORD relied upon the decision of his learned predecessor in *King's Case*, to which I shall presently refer. I have carefully examined that case and other authorities, and after a careful consideration of the provisions of the present Bankrupt Act I have reached a conclusion different from that announced by the learned judge of the Southern District. While I regret this difference of opinion, my own convictions are so strong that I feel bound to decide the question in accordance with such convictions, and to state my reasons therefor; and then to leave it to Congress to settle the question by legislation, if such legislation shall be deemed expedient.

In discussing the question thus presented, it is proper first to consider the nature and object of the proceeding which requires its determination.

The question can only arise upon the application of a bankrupt for a judicial discharge from all his debts, and these applications are to be granted in most cases without even a partial performance of the legal obligations of the bankrupt. The application is to be granted or denied by a court, in the regular course of judicial proceedings, and the discharge, if it be properly obtained, is a conclusive bar to any suit prosecuted for the collection of a debt, provable against the bankrupt's estate, which existed at the time of the filing of his original petition.

That all creditors whose rights may thus be conclusively barred by the decision of a court of justice, should have the right to be heard in opposition to such decision, is a proposition so plain and self-evident, that it would seem that its obvious truth would be at once admitted alike by lawyers and laymen without the thought that either argument or authority might be requisite for its maintenance. If authorities were required it would be easy to produce them in great numbers, and from the highest sources; but two or three will suffice. In the case of *The Mary*, 9 Cranch 126, 134, Chief Justice MARSHALL, in delivering the opinion of the Supreme Court of the United States, said: "It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence he shall have notice, either actual or constructive, of the proceedings against him."

But notice to a party is worthless, unless he has the privilege of being heard; and Mr. Justice STORY, in *Bradstreet v. The*

Neptune Insurance Company, 3 Sumner 600, 607, said: "It is a rule founded in the first principles of natural justice that a party shall have an opportunity to be heard in his defence before his property is condemned," &c. In the case of *Hollingsworth v. Barbour*, 4 Peters 466, it was declared by Mr. Justice TRIMBLE at the circuit, p. 472, that "by the general law of the land, no court is authorized to render a judgment or decree against any one or his estate, until after due notice by service of process to appear and defend." And he added: "This principle is dictated by natural justice; and is only to be departed from in cases expressly warranted by law, and excepted out of the general rule." And he further declared, p. 475, that the reason of the rule that judgments and decrees are binding only on parties and privies "is founded on the immutable principles of justice that no man's right should be prejudiced by the judgment or decree of a court without an opportunity of defending the right," &c.; and all this was concurred in by the Supreme Court, p. 470.

In view of the principles thus sanctioned by the highest authority it would seem to be a reproach to the national legislature to hold that it was intended that any creditor whose claims would be barred by a discharge should be deprived of his just right to be heard, in opposition to such discharge; and certainly an intention to violate those principles of natural justice, and deny the creditor's right to be heard, should not be imputed to Congress unless such intention is clearly expressed, or must necessarily be implied from the language of the statute: *Hollingsworth v. Barbour*, 4 Peters 472. It is certain that no such intention is clearly expressed in the Bankrupt Act now in force, and it is believed that no such intention can be reasonably inferred from any of its provisions.

But before discussing these provisions it may be proper to refer to the provisions of the Act of 1841, and to the decision under that act made by the learned judge who then presided in the Southern District of New York, and which, it is supposed, led to the decision lately made by his successor, under the Act of 1867.

In the case of *Brown King*, 1 N. Y. Legal Observer 21, s. c. 5 Law Rep. 320, Judge BETTS decided that, under the Bankrupt Act of 1841, a creditor who had no interest, except in that character, and who had not proved his debt, could not be permitted to oppose a bankrupt's discharge.

That case was decided upon the 4th section of the Act of 1841, which provided that no discharge should be granted "until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other person in interest, may appear and contest the right of the bankrupt thereto;" and it was upon this language that Judge BETTS held that creditors, "as such, could not rightfully appear in the controversy, but must have the further qualification of having proved their debts."

It is clear that there was no express exclusion of the right of the creditor who had not proved his debt by the language of the 4th section above quoted: Such a creditor was a person in interest, and as he was not embraced in the class of "creditors who have proved their debts," he was, by the ordinary rules of construction, embraced in the other class of "other persons in interest."

In the case of *Tebbets*, 5 Law Reporter 259, Mr. Justice STONY said in respect to parties opposing a discharge: "If they are not strictly, in the sense of the law, creditors of the bankrupt, they are at least equitable creditors;" and declaring that their claims would be enforced in a court of equity, he allowed them to oppose the discharge, although (as I understand the case) they were not "creditors who had proved their debts."

In the case of *Book*, 3 McLean's Rep. 317, Mr. Justice McLEAN, in commenting upon and overruling the case of *King*, said: "In the matter of *Brown King*, Southern District of New York, 5 Law Rep. 320, it was held that the terms 'other persons in interest,' used in the 5th section, are employed to designate those who could not prove debts as creditors, and does not embrace, but excludes, creditors. That these words may embrace those who are not properly creditors but have an interest in the matter, may be admitted; but that they exclude creditors who have not proved their debts, is a gratuitous assumption not warranted by law."

In *Haxtun v. Corse*, 2 Barb. Ch. Rep. 506, 529, the decision in *Brown King's Case* was commented upon by the late Chancellor WALWORTH, and that eminent jurist expressed the opinion that Judge BETTS's decision was "an erroneous construction of the

statute" * * * "and that the framers of the law intended to give all persons interested in opposing the bankrupt's discharge, as well as creditors who had proved their debts against him, the privilege of appearing and contesting his right to such a discharge."

Under the provisions of the same section of the Act of 1841, it is clear that any creditor of the bankrupt, whether he had proved his debt or not, might impeach the discharge (when pleaded as a defence to the suit of such creditor) for fraud or wilful concealment which might have been urged in opposition to the discharge; and if Judge BETTS's decision is correct, a creditor who, under this same section, could not oppose the action of the court in granting the discharge when applied for, could defeat such action after the discharge had been granted. This would be absurd, and I cannot but think that, both upon reason and authority, it may be properly assumed that Judge BETTS's decision in *King's Case* was a hasty and erroneous construction of the Act of 1841.

But the reasoning upon which Judge BETTS based his opinion in *King's Case* is not applicable to a case arising under the existing Bankrupt Act. It may be conceded that the 29th section of the present act, which provides for notice to show cause against a discharge, carefully provides for notice to creditors who have proved their debts, and that it does not contain any very clearly expressed provision for giving notice, in terms, to any other parties. It provides that the court shall order notice of an application for a discharge "to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors reside, to appear on a day appointed for that purpose and show cause," &c. Now, though it is not expressly stated that notice must be given to any creditors except those who have proved their debts, it is clearly to be inferred that the publication of the notices is required for the benefit of other creditors; for this publication is in addition to the personal notice required to be given by mail to all creditors who have proved their debts, and in providing for the designation of the newspapers in which the

publication is to be made, reference is made to the creditors generally, and not alone to those who have proved their debts.

It will also be observed that in this section no reference is made to "other persons in interest;" but the more important, and under Judge BETTS's decision the vitally important difference between the Acts of 1841 and 1867 is that in the Act of 1867 there is, in immediate connection with these provisions for giving notice, no provision declaring the right of "creditors who have proved their debts and others in interest," to appear and oppose the discharge, as was the case in the Act of 1841. The last of these omissions is supplied by the 31st section of the present Bankruptcy Act, which provides "that ANY CREDITOR opposing the discharge of a bankrupt may file a specification in writing of the grounds of his opposition;" thus providing for opposition by "any creditor," and not by any creditor who has proved his debt, as in the Act of 1841. This is a very important change from the language of the Act of 1841; and if the decision in *King's Case* was not erroneous it is not an authority against the right of the creditor in this case, for the term *any creditor* can by no just construction be limited to a creditor who has proved his debt.

Notwithstanding the provisions of the Acts of 1841 and 1867, which are apparently intended to give permission to creditors, or to creditors and others in interest, to appear and oppose a discharge, it is very clear under the authorities before cited and many others of a similar character, that the courts in administering these acts would have allowed such opposition if no such permission had been expressly given; and in order to bar the creditor's right to appear and oppose the discharge the bankrupt must show that such right has been taken away by the statute, either in express terms or by necessary implication: *Hollingsworth v. Barbour*, 4 Peters 466. As has been shown, the Act of 1867, in the sections which bear upon this question, only speaks of *creditors who have proved their debts* in the one case, and creditors generally in the other; and yet Form No. 51 prescribed by the justices of the Supreme Court of the United States very properly provides for notice to all creditors who have proved their debts "*and other persons in interest*;" although "other persons in interest" are not embraced in any of the provisions of the act relating to the application for a discharge, the notice to show

cause against the same, or the opposition to be made to such application. Parties who are not creditors are, therefore, to be permitted to oppose a discharge upon principles of justice universally acknowledged by the courts of all civilized countries, and not under any permission given by the Bankrupt Act.

But it may be said that without any express provision of the statute, or any necessary implication from its language, the Bankruptcy Courts should require a creditor to show his interest in the proceedings by proving his debt before allowing him a standing in court for the purpose of opposing a discharge; and that requiring him to take the position of a creditor who has proved his debt is no denial of the right which has been declared to be founded in the principles of natural justice, for the reason that such requirement is easily fulfilled. It is conceded that proof of his interest, if it does not clearly appear by the schedules of the bankrupt, may properly be required of the creditor; but it being certain that a party, in order to become a creditor who has proved his debt, must in many cases relinquish most important rights, and that to impose upon the creditor, unnecessarily, any injurious terms, as a condition of his being heard, is as inconsistent with the principles of justice, and, to the extent of the injury inflicted by the imposition of such conditions, as gross a denial of the just rights of the creditor as an absolute refusal to allow him to be heard, he ought not to be required to become, technically, "a creditor who has proved his debt." Very injurious terms will certainly be imposed in many cases if it be held that a party must take the position of a "creditor who has proved his debt" against the estate of the bankrupt before he can oppose his discharge. In many cases in which the application for a discharge is made at the end of sixty days under section 29, on the ground that no assets have come to the hands of the assignee, it will (under the provisions of section 20) be impossible for the creditor to prove his debt, without relinquishing his lien by judgment or mortgage, at any time before the day fixed for the final hearing on the application for a discharge.

By section 20, it is provided that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as creditor only for the balance of the debt after deducting the value of such property,

to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property and be admitted to prove his whole debt. * * * *If the property is not so sold or delivered up, the creditor shall not be allowed to prove any part of his debt."*

By section 21, it is provided that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against said bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained, thereon shall be deemed to be discharged and surrendered thereby, &c." Why should a creditor holding a mortgage or judgment for \$15,000, partially secured by its lien on \$10,000 worth of real or personal estate, and who is willing that the other creditors of the bankrupt should take all of the property of the bankrupt which is not bound by this mortgage or judgment, be compelled to relinquish his lien, before he is allowed to show fraud on the part of the bankrupt, and defeat his application for a discharge, in order to preserve the right to collect his debt out of the subsequently acquired property of the bankrupt. It is quite proper to require a creditor to prove a debt before allowing him to make any motion in respect to the bankrupt's estate in the hands of the assignee; but why should it be required by the legislature or by the courts, when the creditor only seeks to prevent the bankrupt's discharge? That the legislature has not expressly required it is very clear, and there is strong reason for believing that it was not intended to be required.

By the 35th section of the present act "any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same;" and there is no requirement that he shall prove his debt against the bankrupt's estate. It would seem that to deny a creditor the right to oppose the granting of a discharge because he had not proved his debt, and then allow him to apply to the court which granted it, to set it aside, at any time within two years, without proving such debt, would be grossly absurd.

If the narrow construction which has been contended for is to prevail and no effect is to be given to the 31st section of the present Bankrupt Act, it would seem that no one but a creditor who has proved his debt can oppose a bankrupt's discharge, as other persons in interest are not named in the act; and upon the same principles of construction it may well be contended that only such creditors as had proved their debts prior to the granting of the order to show cause can be allowed to appear and make such opposition. I am satisfied that neither of these propositions can be maintained; and after the fullest consideration I have been able to give the whole subject, I am of the opinion that the construction given to the Act of 1841 by Mr. Justice McLEAN and Chancellor WALWORTH, and not that given by Judge BETTS in *King's Case*, was the proper construction of that act; and that under the 31st section of the present Bankrupt Act there is no sufficient reason for denying the right of the creditors, who have appeared in this case, to contest the discharge of the bankrupt, even if it be conceded that *King's Case* was properly decided. They will, therefore, be recognised as having a proper standing in court for that purpose.

United States District Court—Western District of Pennsylvania.

MATTER OF OWEN BYRNE, A. BANKRUPT.

A *bond fide* transfer of partnership effects by one member of the partnership to another vests the title in the transferee as his separate estate.

Where there are both joint and separate debts, proved in a bankruptcy on a separate petition, the joint creditors are not entitled to participate in the distribution of the assets until the separate creditors are paid in full.

The exception in the general rule of law, which allows joint creditors to receive dividends *pari passu* with the separate creditors in cases where there is no joint estate and no solvent partner, is inoperative under the Bankrupt Law of 1867.

A. transferred his interest in partnership effects to his copartner B., on the 2d of October, on his (B.'s) promise to pay the firm debts; without buying any new stock or making any effort to continue the business, B. filed his petition in bankruptcy on the 7th of October: *held*, that the transfer was accepted by B. in contemplation of filing his petition in bankruptcy, and that the transfer was void as a fraud on the creditors of the partnership.

THIS was a case certified by the register for the opinion of the court.

Owen Byrne, the bankrupt, had been in partnership with W. P. Graham, in the hat business, in the city of Pittsburgh. On the 2d day of October 1867, the firm was formally dissolved, Graham giving to Byrne "entire possession of the store fixtures and goods and debts due the concern," and Byrne agreeing "to pay all the debts and liabilities of the concern, and save Graham harmless from liability therefrom."

Five days afterwards, Byrne filed his petition for adjudication in bankruptcy. In the mean time, no new stock had been purchased, nor had Byrne made any effort to continue the business.

Byrne was at the same time carrying on a separate trade as a merchant tailor in another part of the city.

In his inventory of assets, Byrne set out the stock formerly belonging to the partnership separately from the stock of tailor's goods. He also set out book accounts due to the partnership amounting to \$136.85.

The assignee realized as follows: On the partnership stock \$1179.87, on the partnership debts \$3.50, on the separate stock \$1387.11, and on the separate debts \$95.75. There was yet some separate real estate undisposed of.

Graham, the other member of the partnership, had also filed his petition and been adjudicated a bankrupt by this court, so that there was no solvent partner.

J. M. Kennedy, for a separate creditor, contended that by the dissolution of the firm of Graham & Byrne, the stock of hats became the separate estate of Byrne, and that in the distribution of the funds in the hands of the assignee, the joint creditors cannot participate until the separate creditors have been paid in full.

A. H. Miller, for the joint creditors, contended that all the assets in the hands of the assignee must be distributed among all the creditors, joint and separate, *pro rata*, without priority or preference, as provided in section 27 of the Bankrupt Law; that the 36th section does not apply to this case, as it has reference exclusively to the bankruptcy of partnerships existing at the time of the presentation of the petition in bankruptcy, and that the whole spirit and meaning of the Bankrupt Law is against preferences.

He further contended that if the court be of opinion that the

joint creditors cannot participate with the separate creditors in the distribution of the separate estate, that the circumstance of the filing of the petition so soon after the dissolution, must render the transfer of the partnership property to the sole possession of Byrne void as a fraud upon the joint creditors.

The following questions were submitted :—

1. Does the transfer of partnership property by one partner to another change the character of the property from joint to separate ?

2. Can the joint creditors share equally with the separate creditors in the distribution of the assets of one member of a firm on a separate petition ?

3. Is the assignment by Graham to Byrne void as a fraud upon the joint creditors ?

The Register [SAMUEL HARPER]—1. The first question has been frequently adjudicated in England and in this country, and it is well settled that a *bonâ fide* sale for valuable consideration, by one partner to another, of all the partnership effects, vests the sole title in the latter as his separate estate : Story on Part. 358, 372, and authorities there cited ; Hilliard on Bank. and Ins. 64, and cases cited ; *Robb v. Mudge*, 14 Gray 504 ; *Howe v. Lawrence*, 9 Cush. 558 ; *Ensign v. Briggs*, 6 Gray 329. This has been held even when the firm and both partners were at the time insolvent, more especially if the partners have no knowledge of such insolvency ; and in some cases it has been ruled that even this knowledge would not avoid the transfer : *Howe v. Lawrence*, 9 Cush. 558 ; *Ex parte Peake*, 1 Madd. 346.

2. The principle involved in the second question has been liable to great fluctuation. As early as the time of Lord Chancellor HARDWICKE it was held that joint creditors might be admitted to prove under separate commissions, for the purpose of assenting to or dissenting from the discharge, but not to receive dividends until after the separate creditors were paid in full. Chancellor KENT, in *Murray v. Murray*, 5 John. Ch. 72, traced the course of the English Equity decisions upon this point, and thought that the rule just stated was just and reasonable, while Judge STORY, in his work on Partnership, at section 382 says, “ that it rests on a foundation as questionable and unsatisfactory as any rule in the

whole system of our jurisprudence," although he says that it is for the public peace that it should be left undisturbed.

The rule, however, has been subject to three exceptions : First, where a joint creditor is the petitioning creditor under a separate fiat. Second, where there is no joint estate and no solvent partner. Third, where there are no separate debts.

The facts agreed upon by the parties to this certificate show that there is no solvent partner, but it is not agreed that there is no joint estate. At the date of the dissolution there were debts due the firm of Graham & Byrne amounting to \$186.85, and although they were embraced in the assignment yet it has been held that such debts will remain in the Order and disposition of the partnership, and form part of the joint estate, unless *prior to the bankruptcy*, notice of the assignment has been given to the debtors : Story on Part. § 403. Public notice in the Gazette was held to be insufficient, and that the debts owing by those debtors who had not express notice remained in the partnership : *Ex parte Usborne*, 1 Glyn & Jam. 358. As the filing of the petition followed so closely after the dissolution, it is not unreasonable to hold that the debtors of the firm had not received express notice prior to the bankruptcy. These debts then will constitute a joint estate, to which the joint creditors must resort, and leave the separate estate of the bankrupt to the separate creditors as provided by the 36th section of the present Bankrupt Law. If there be any joint fund, however small, the assets are to be marshalled according to the partnership rule, although the fund may have been created by the separate creditors purchasing some of the partnership assets actually worthless, for the purpose only of creating it : *In re Marwick*, Davies 229. Where there was joint estate to the amount of £13, it was held that the joint creditors could not receive dividends from the separate estate until all the separate creditors could be paid in full, although it did not appear that after costs any amount of the £13 would remain for distribution : *Ex parte Kennedy*, 19 Eng. Law & Eq. 150. Five shillings has been held sufficient joint estate for this purpose.

But whether these debts are joint estate or not, it seems that joint creditors are not entitled to dividends until the separate creditors are paid in full. It is said that where an insolvency statute adopts in terms the general rule (as is the case in section 36 of the present Bankrupt Law), it is not only rigidly applied,

conformably to the practice in England, but the exception to the rule already stated is held to be impliedly abrogated: *Hilliard on Bank. and Insolv.* 69. In *Howe v. Lawrence*, 9 Cush. 559, BIGELOW, J., said: "The statute recognises no such exception. The rule is direct and peremptory. This provision was reported and enacted with a full knowledge of the exception. The rule may sometimes operate harshly; but it is definite, clear, and easily applied. The exceptions to it are artificial and refined, leading to nice and subtle distinctions, and sometimes operating with great inequality and injustice. Under such circumstances, we are unwilling to adopt it into our jurisprudence." See also *Somerset v. Minot*, 10 Cush. 597. These decisions were under the Insolvent Laws of Massachusetts which contain almost identically the same provisions in regard to this rule as the present Bankrupt Law, and are good authorities upon this question.

I am unable to see what bearing the provisions of the 27th section have upon this question. They do, it is true, prohibit preferences among creditors—the very essence of the bankruptcy system; but the 36th section enacts in terms the partnership rule, and the two sections must be taken together. When there is a joint fund the joint creditors take it, and when there is a separate fund the separate creditors take it; and the 27th section merely provides that when the creditors who are entitled to share in the distribution have been determined, they shall take *pro rata*. Prohibiting the joint creditors from sharing in the separate estate, or the contrary, is not a preference in favor of the separate or joint creditors, as the case may be, denied by law, but an equitable rule which the courts are to administer under the direction of the law.

I had written thus far when my attention was drawn to a decision upon this question in the District Court for the Northern District of Illinois: *In re Jewett*, reported in the American Law Register for March, p. 291. The syllabus is as follows: "Where there are both individual and partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to the bankruptcy, and being principally the same goods in the purchase of which the partnership debts had originated; the partnership creditors will be entitled to be paid *pari passu* with the individual creditors." This decision does not, it

seems to me, rest on the reason of either the rule or the exception. It did not appear that there was or was not a solvent partner and joint estate, and the register ruled that inasmuch as the separate creditors did not prove that there was a solvent partner and joint estate, the joint creditors were entitled to dividends *pari passu* with the separate creditors. I submit as better reasoning that the burden of proof was on the joint creditors to establish the facts necessary to make the exception operative as they sought to avoid a well-settled rule of law and equity. But the register has overlooked the American decisions upon this question which I have cited, and it seems clear that the weight of authority preponderates greatly against his decision. I can perceive nothing in his opinion to warrant me in modifying the views I have expressed.

Third. To pass the title to partnership property to one member of the firm, the transaction must be *bond fide*. If there be want of good faith sufficient to raise a presumption of fraud, equity will declare the assignment void. It has already been seen that insolvency of the firm and of the members of it, and even a knowledge of such insolvency by the partners, will not make the transaction void. The circumstances of this case, however, are peculiar, and so far as the law of bankruptcy is concerned I have not been able to find a parallel to it in the books. But five days intervened between the dissolution and the filing of the petition, and one was a Sunday. Allowing a reasonable time for the preparation of the petition and schedules, the conclusion is almost irresistible that the bankrupt had in contemplation the filing of his petition at the very time he accepted the transfer of the partnership property. Surely this consideration is sufficient to make the assignment void as to the joint creditors, and to return the proceeds arising from the sale of the stock of hats, caps, and furs to the order and disposition of the partnership as joint estate.

The first and third questions are decided in the affirmative, and the second in the negative.

On the request of the parties the questions were certified to the judge for his opinion.

MCCANDLESS, J.—The Register is clearly right upon the several points presented, and his decision is affirmed.

United States District Court, District of Indiana.

BRADSHAW, ASSIGNEE, &c., v. KLEIN.

An assignee in bankruptcy may maintain an action to set aside a fraudulent conveyance by the debtor before he was adjudged a bankrupt, even though the conveyance was before the passage of the Bankrupt Act.

Such action is not limited to conveyances made within six months of the filing of the petition. The general language of the 14th section of the Bankrupt Act is not limited in this respect by the 35th section.

THIS was a bill in equity, filed by William A. Bradshaw, assignee of Armsted M. Klein, a bankrupt, against Henry Klein and others.

The bill charged that the bankrupt, before the passage of the Bankrupt Act, transferred certain property to one John A. Klein, without consideration, for the purpose of defrauding the bankrupt's creditors; that said John A. Klein, without consideration, transferred the same to the defendants, who now claim title thereto; and that the bankrupt has ever retained, and now retains possession of said property. And it prayed that the property be made assets in the assignee's hands for the benefit of the bankrupt's creditors.

The defendants demurred to the bill, and the only question made in support of the demurrer was: Can the assignee of a bankrupt maintain an action to recover back property conveyed away by the bankrupt with intent to defraud his creditors?

March, in support of the demurrer, argued that the assignee takes such rights of action only as the debtor had before he was adjudged a bankrupt; and that, as he could not have sued, before that adjudication to recover back property conveyed by him in fraud of his creditors, so his assignee cannot, afterwards, sue to recover it back.

Ritter, for plaintiffs.

McDONALD, D. J.—There can be no doubt that a transfer of property, made with intent to defraud creditors, is valid as between the parties to it; and that the seller having delivered over the possession of the property, cannot recover it. To such a case the maxim applies, that *in pari delicto potior est conditio possidentis*.

And it is true that the 14th section of the Bankrupt Act transfers to the assignee all the rights of property and of action previously held by the bankrupt. But does the assignee represent the rights of the bankrupt, and his rights only? Does he not also represent the rights of the creditors?

It is very clear that, but for the adjudication of bankruptcy, the creditors might subject to the payment of their debts property conveyed by their debtor in fraud of their rights. But now, since he is adjudged a bankrupt, this right is taken away from them. The law will not allow them to sue at all for their debts. And if the assignee cannot maintain an action to have the fraudulent conveyance set aside, and the property subjected to the payment of debts due to creditors, there can be no remedy whatever in such a case. So to decide, would altogether defeat the operation of the statutes against fraudulent conveyances in all cases of bankrupt debtors. For if the ground assumed in support of the demurrer be tenable, then a failing debtor may to-day transfer all his property with intent to defraud his creditors, and six months hence be adjudged a bankrupt, without any power in any person to reduce the property thus fraudulently conveyed to assets for the payment of his debts. Courts ought to be very reluctant to indulge a doctrine fraught with such consequences. Under the Bankrupt Act of 1841, the Supreme Court of Mississippi has, indeed, held this doctrine. But I have no hesitation in pronouncing that decision erroneous. A very high authority, Judge CURTIS, under the Act of 1841, decided differently. He held that "there is a broad distinction between a bill by a bankrupt, the author of the fraud, and one by the assignee, who seeks to recover the property for the benefit of the very interest sought to be defrauded; and that the ground of refusing relief to the author of the fraud is a principle of public policy, which forbids the court to be auxiliary to a plan for evading the law and depriving the creditors of their just and legal rights; but that when the assignee sues, the case is reversed—to grant the relief, is to act in accordance with these rights of creditors and in opposition to the contemplated fraud, while to refuse it, would be to aid in its perpetration." *Carr v. Hilton*, 1 Curtis' Rep. 230.

If, as Judge CURTIS held, under the Act of 1841, the assignee of a bankrupt might maintain an action to set aside a fraudulent conveyance made before that act was passed, the reason for allow-

ing such an action, under the Bankrupt Act of 1867, is much stronger. The Act of 1841 merely provided, as the present act provides, that the bankrupt's title to all his property should vest in his assignee, with the right to sue for the same: 5 U. S. Statutes at Large 442, 443. But the Bankrupt Act of 1867 goes a step further, and, in the 14th section, declares that, "All the property conveyed by the bankrupt in fraud of his creditors * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee."

Counsel for the defendant insist, however, that the 35th section of the act modifies the language of the 14th section above cited, and limits the right of action to set aside fraudulent conveyances to four, or, at most, six months. But I cannot assent to this construction. I think the provision above cited from the 14th section relates to the state statutes against fraudulent conveyances, and to these only; and that the 35th section of the Bankrupt Act has no reference to those statutes, but is only intended to reach frauds on the Bankrupt Act. The two sections relate to different subjects; neither of them, therefore, can be construed as explaining, modifying, or limiting the operation of the other.

On the whole, I conclude that an assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the Bankrupt Act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the Statute of Limitations.

The demurrer is overruled.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.¹

COMMON CARRIERS.

Limitation of Liability.—A common carrier cannot limit his liability by a memorandum or note on the card or ticket which he delivers on the

¹ From Hon. O. L. Barbour; to appear in Vol. 49 of his Reports.

receipt of goods to be transported by him: *Limburger v. Westcott*, 49 Barb.

Thus, where, by a memorandum on a receipt for baggage, issued by an express company, it was stated that the liability of the company was "limited to \$100, except by special agreement to be noted" thereon, *Held*, that in the absence of any knowledge by the owner of the baggage of such condition, there was no consent to it by him, and no bargain between the parties, limiting the liability of the company: *Id.*

CORPORATION.

Who are to be deemed Servants of.—A person employed by a manufacturing corporation as its *civil engineer and travelling agent*, at a fixed salary, is a *servant* of the corporation, within the meaning of the 18th section of the Act of the legislature of 1848, which makes the stockholders of such corporations personally and individually liable for debts due to their laborers, *servants*, and apprentices: *Wilkinson v. Wadsworth*, 49 Barb.

DAMAGES.

For refusing to deliver Bonds bought.—In an action to recover damages for refusing to deliver bonds, alleged to have been bought by the defendant as the plaintiff's agent, the plaintiff, to prove the value of the bonds, may show that they were paid by the company issuing them in gold. He may also prove what gold was worth, in currency, at that time: *Simpkins v. Low*, 49 Barb.

It is erroneous to limit the plaintiff's recovery, in such an action, to nominal damages, where there is proof that the bonds were worth par, in gold, as collateral security, and the evidence warrants the conclusion that they were worth more than par, in currency: *Id.*

Such evidence should be submitted to the jury, and it should be left with them to assess the damages, free from any restriction. The Legal Tender Act, passed by Congress, is not to be construed as excluding such evidence from the consideration of the jury: *Id.*

It was not intended, by that act, to enable an agent, after having received for a claim gold coin, to relieve himself from liability by payment in currency: *Id.*

FRAUDS, STATUTE OF.

Memorandum in Writing.—The receipt by mail, by a purchaser, of a bill of the goods purchased, containing the terms of sale, will not take a parol contract of sale out of the Statute of Frauds; but either party may repudiate such contract, at any time before the actual receipt and acceptance of the goods by the purchaser: *Pike et al. v. Wieting et al.*, 49 Barb.

HUSBAND AND WIFE.

Suits between.—At common law, a suit was maintainable, in equity, by a wife against her husband, to recover money, the separate property of the wife, which he had wrongfully taken and converted, and the Code of Procedure having abolished the distinction between equitable actions and actions at law, and the old forms of pleadings, a complaint setting forth such a state of facts and praying judgment against the defendant for the amount taken by him and converted to his own use, states a good

cause of action, and is therefore not demurrable: *Whitney v. Whitney*, 49 Barb.

INJUNCTION.

To restrain proceedings in Courts of a sister State.—While, as a general rule, the courts of this state decline to interfere by injunction, to restrain its citizens from proceeding in an action which has been commenced in a court of a sister state, there are exceptions to this rule; and when a case is presented, fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction, to prevent oppression or fraud. No rule of comity or policy forbids it: *Vail et al. v. Knapp et al.*, 49 Barb.

MANDAMUS.

Discretion as to granting.—The court may exercise a discretionary power as well in granting as in refusing a *mandamus*; as where the end is merely a private right, and where the granting of it would be attended with manifest hardships and difficulties. This discretion should be exercised soundly, and in accordance with the peculiar circumstances of the case: *The People ex rel. Hackley et al. v. The Croton Aqueduct Board*, 49 Barb.

The defendants issued proposals for the building of a stone tower, engine-house, &c. The relators were the lowest bidders for the work, but the defendants refused to award the contract to them, or to any one else, for the alleged reason that no appropriation to cover the expense existed; that they had changed the design and character of the work to be done, and decided that the public interests required that the work should be re-advertised and let under proposals framed in accordance with such alterations. *Held*, that the issuing of the notice inviting proposals did not alone and of itself bind the defendants to award the contract to the lowest bidder, or create any obligation, on their part, to award it at all. But that, if the bids were extravagant, or far beyond the amount of the contemplated expenditure, they might, in their discretion, reject them altogether. And that, under the circumstances, it would not be a proper exercise of judicial power to grant a *mandamus* to compel the defendants to award the contract for the work in question to the relators: *Id.*

MASTER AND SERVANT.

Liability of Master to Servant for Negligence.—Ordinarily, an employer is not liable for injuries to one of his employees occasioned by the negligence of another employee engaged in the same general business. Such employees, on entering the service, take upon themselves, as an incident to the hiring, the ordinary risks and dangers arising therein, which includes the negligence or carelessness of their fellow-servants: *Faulkner v. The Erie Railway Company*, 49 Barb.

No distinction arises from the different grades or ranks of the employees, nor from their being engaged in different kinds of work; provided the services tend to accomplish the same general purpose: *Id.*

An employer is, however, responsible for injuries to employees arising from his personal neglect, or from the want of ordinary care and precaution on his part in the selection of employees: *Id.*

PRINCIPAL AND AGENT.

Authority of a General Agent—particular instructions.—If a general agent has received particular instructions, which he disregards, his acts as agent are, nevertheless, binding upon the principal. As between the principal and a general agent, any deviation from particular instructions will render the latter accountable to the former for any loss he may sustain in consequence of such deviation; but, as to third parties, who may have dealt with the agent, any limitation of the authority, not communicated to them, will have no effect: *Edwards v. Schaffer et al.*, 49 Barb.

P., who purchased of the plaintiff certain goods for the defendants, was employed by the latter to transact their business in that branch of their commercial house situated in the city of New York. They had a manufacturing establishment in Prussia; they transmitted a portion of the goods there manufactured to New York, which were sold there by P., who was in the habit of purchasing goods for them there to be used in their manufactory in Prussia. P. published notices and wrote letters in the defendants' name and style; and acted precisely as his principals would have done had they been here. The firm-name of the defendants was on the sign over the door of their place of business in New York; and when payment for the goods was demanded, P. wrote a note, signed in the name of the firm, promising payment at an early day. *Held*, that this was sufficient to show that P. was the defendants' general agent, acting as their representative to do everything for them which the necessities of their business here required. And that in the absence of any instrument expressly appointing him to do this, the facts showed an implied authority: *Id.*

Where principals accept, and pay for, a portion of the goods purchased for them by their agent, they thereby dispense with any particular instructions directing that the whole shall be delivered at once. If they design to accept no more than the portion already delivered, they should give early notice of that intent: *Id.*

RAILROAD COMPANIES.

Liability for defective Bridges.—Where a railroad bridge was well built, of good sound materials, upon a plan in common use, and the evidence as to its strength and capacity was abundant, and its sinking was in no sense due to any defect in its original construction, but to a process of natural decay called dry-rot; and the day before it fell it had been inspected by the repairer of bridges and the division superintendent, competent men, and examined, tested, and watched under the weight of a train of cars: *Held*, that the company was not liable to the representatives of an employee who was killed by the falling of the bridge, either on the ground of a defect in its construction constituting negligence or want of ordinary care, or by reason of the employment of incompetent, unskilful, or improper persons to examine the bridge: *Faulkner v. The Erie Railway Company*, 49 Barb.

Held, also, that to render the company liable, on the latter ground, it must affirmatively be made to appear that proper care was not used in the selection of its agents; and that by the exercise of proper care those

agents would have been rejected as incompetent. The company is not a guarantor of competency or fitness in its employees: *Id.*

Held, further, that the company was not responsible for the insufficiency of the bridge, in the absence of notice, unless the company was ignorant of its condition through its negligence or want of proper care: *Id.*

Must accept Legal Tender Notes for Fares.—Under the Act of Congress approved February 25th 1862, authorizing the issue of United States notes, and declaring that they shall "be lawful money and a legal tender for all debts, public and private, within the United States, except duties on imports," &c., a railroad company is bound to accept United States notes issued in pursuance of that act, at the value expressed on the face of them, in payment of fares upon its railroad, when demanded in advance of transportation on such road: *Lewis v. The New York Central Railroad Company*, 49 Barb.

If it exacts payment of the legal fare of a passenger, in advance, in gold or silver coin of the United States, or the market value of such coin in United States notes, it will be guilty of extortion, and liable to the penalty imposed by the Act of the legislature of March 27th 1857, for asking and receiving a greater rate of fare than that allowed by law: *Id.*

SHIPS AND VESSELS.

Attachments against.—Within the contemplation of the Act of the Legislature of April 2d 1862, providing for the collection of demands against ships and vessels, and other similar statutes, the place where the services are in fact rendered, although they are rendered under and in pursuance of a contract made at another place, is the place where the debt is deemed to have been contracted: *Mullin v. Hicks*, 49 Barb.

Thus, where a contract was entered into at the city of New York, between the plaintiff and the master of a vessel, by which the former agreed to load the vessel with oak timber, for a specified sum; and the ship—then lying at Brooklyn—was afterwards moved to Weehawken, in the state of New Jersey, where she was loaded by the plaintiff, under and in pursuance of the contract, it was *held*, that the sum due to the plaintiff, for his services in loading the ship, was not a debt contracted within the state of New York, nor a subsisting lien upon the vessel, for which an attachment could be issued under the statute: *Id.*

STAMPS.

On Chattel Mortgages.—The latter clause of the provision of the Internal Revenue Act of the United States, authorizing the collector to allow stamps to be affixed to mortgages, when they have been omitted without intent to evade the provisions of that act, or to defraud the government, but declaring that "no right acquired in good faith before the stamping of such instruments * * * and the recording thereof, if such record be required by law, shall in any manner be affected by such stamping," &c., does not apply to *chattel mortgages*, inasmuch as it contemplates mortgages which require to be recorded: *Vail et al. v. Knapp et al.*, 49 Barb.

Chattel mortgages are merely filed, and an entry made in a book kept

by the clerk, of the names of the parties, the amount secured, the date, time of filing, and when due. This cannot be regarded, in any proper sense, as *recording* a mortgage: *Id.*

The statute is highly penal, and should not, even in a doubtful case, receive a construction which would invalidate the security: *Id.*

On Mortgages to secure Contingent Liabilities.—Under the provision of Schedule "B" of the Revenue Act, specifying among the instruments which require to be stamped "Mortgage of lands, estate, or property, real or personal * * * where the same shall be made as a security for the payment of any definite and certain sum of money lent at the time, or previously due and owing, or forborne to be paid, being payable," no stamp is necessary upon mortgages executed to secure the mortgagees as drawers and indorsers of drafts drawn for the benefit of the mortgagors, and payable *subsequent to the execution of such mortgages*, where no money was lent at the time, nor had any become due and owing, nor was any forborne to be paid, *being payable: Id.*

WILL.

Construction of.—A testator devised to his wife and daughter, each, the equal one-half part of his estate, real and personal, share and share alike, subject to these restrictions, viz.: that each of the devisees was vested with a power of testamentary disposition, unaffected by any trust or limitation; but in case of the death, *intestate and without issue*, of either devisee, whatever might remain of the said property was devised to the survivor. *Held*, that each devisee might, during her lifetime, dispose of the entire fee of the estate devised to her, for her own benefit; and that, the devisees having united in a conveyance to a purchaser of the premises, with covenants of warranty, such conveyance passed all the title of the grantors, either vested or contingent; that such title was good, and the purchaser was in equity bound to accept it: *Freeborn et al. v. Wagner*, 49 Barb.

Publication.—To constitute a valid publication of a will or codicil, the testator must, in the presence of two witnesses, declare the instrument to be his last will and testament, or a codicil thereto. If the proof fails to establish such a declaration, to one of the subscribing witnesses, the instrument should not be admitted to probate: *Abbey v. Christy*, 49 Barb.

Where one of the attesting witnesses testified that on entering the testator's room, the latter, taking a paper out of his portfolio, desired the witness to read it, which he did, silently; after which the testator requested him to witness his signature; in answer to a question put by the witness, whether he had read the paper produced, the testator said he had heard it read; and being asked if it was all right, he replied, "I think so;" and the other witness testified that when they entered the room the testator remarked that he wanted them to "witness his signature;" that they then put their names to the paper as witnesses, but that nothing was said as to "what the paper was, or anything about it;" that the witness never read it, and did not know what it was. *Held*, that this was not a sufficient publication: *Id.*

THE
AMERICAN LAW REGISTER.

JULY, 1868.

MATERIAL-MEN AND THEIR LIENS.

“STATE statutes, which attempt to confer upon state courts a remedy for marine torts and marine contracts, by proceedings strictly *in rem*, are void:” *The Hine v. Trevor*, 4 Wallace U. S. R. 555.

By the Constitution of the United States (Art. III., § 1), it is enacted that “the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish;” and by § 2, clause 1, of the same article, it is enacted that “the judicial power shall extend * * * * * to all cases of admiralty and maritime jurisdiction.” The 9th section of the Judiciary Act of 1789 (1 U. S. Stat. at L. 76), declares that “The District Court shall have, *exclusively* of the courts of the several states, * * * * *cognisance of all civil causes of admiralty and maritime jurisdiction.*”

This jurisdiction has been repeatedly affirmed by the courts and declared constitutional: *Martin v. Hunter*, 1 Wheat. 304; *Slocum v. Mayberry*, 2 Id. 1; *Gelston v. Hoyt*, 3 Id. 246; *Waring v. Clarke*, 5 How. 451; *The Hine v. Trevor*, 4 Wall. 555; *The Moses Taylor*, Id. 411; in which last case it was declared, “that the provisions of the 9th section of the Judiciary Act, which vests in the District Courts of the United States *exclusive cogni-*

sance of civil causes of admiralty and maritime jurisdiction, is constitutional.”

The jurisdiction of our admiralty courts, as to the liens of material-men, only extends to liens on foreign ships or vessels. These liens, according to the civil law and the general maritime law, extend to all ships, without distinction, whether foreign or domestic: 1 Valin Comm. 363; 1 Parsons' Mar. Law 492. But although the jurisdiction of our admiralty courts originally extends only to foreign ships, yet they have exercised jurisdiction where a lien on domestic ships is given by the law of the state in which the supplies are furnished or repairs performed: *The Schooner Marion*, 1 Story 68, 72; *The Case of Peyroux v. Howard*, 7 Pet. 324; *The General Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 Id. 409; *Pratt v. Reed*, 19 How. 359; *The Brig Nestor*, 1 Sumner 73; *The Barque Chusan*, 2 Story 455; 2 Parsons' Mar. Law 492.

The greatest difficulty has been in determining the extent of the lien for repairs, &c., in a port in the same state. That there is no such lien recognised by our admiralty courts, except that which a shipwright has at common law, so long as he retains possession, is very clear, and has been so affirmed by our courts: *The General Smith*, 4 Wheat. 438; *The Schooner Marion*, 1 Story 68, 72; *Boon v. The Hornet*, Crabbé 426; *Tree v. The Indiana*, Id. 479.

Most of our states have, however, passed laws giving the lien in certain cases, the laws of some states including contracts for building, and in others being limited to repairs and supplies; and in some states the laws include all ships, whether foreign or domestic, and in others only domestic ships engaged exclusively in the navigation of the rivers of such states. These statutes, generally, authorize a suit to enforce the lien, either in the state courts or in the Admiralty Court sitting in that district: 2 Parsons' Mar. Law 493, n. 1.

We propose to discuss these state liens under the following heads:—

I. Are these state statutes creating liens *unconstitutional*; and do they interfere with the *exclusive jurisdiction* of the Admiralty Courts of the United States?

II. The state legislatures have no power to confer any additional jurisdiction upon the United States courts, but they may give

a lien where none before existed, if not in conflict with the Constitution of the United States.

I. In *The Moses Taylor*, 4 Wall. 411, decided by the Supreme Court of the United States, December Term 1866, the court declared, "that a statute of California, which authorizes actions *in rem* against vessels for causes of action cognisable in the Admiralty, to that extent invests her courts with admiralty jurisdiction;" * * * "and that the provisions of the 9th section of the Judiciary Act which vests in the District Courts of the United States exclusive cognisance of civil causes of admiralty and maritime jurisdiction, is constitutional."

In the case of *The Hine v. Trevor*, 4 Wall. 555, decided at the same term, the court held "that the grant of original admiralty jurisdiction by the Act of 1789 (1 U. S. Stat. at L. 76), including as it does all cases not covered by the Act of 1845 (5 Stat. at L. 726), is exclusive, not only of all other Federal courts, but of all state courts; and that, therefore, state statutes, which attempt to confer upon state courts a remedy for marine torts and marine contracts, by proceedings strictly *in rem*, are void, because they are in conflict with that Act of Congress."

Let us examine the facts as set forth in these cases, and understand the grounds upon which they were decided. In the first case, the steamship *Moses Taylor*, of over one thousand tons burden, was owned by one Roberts of the city of New York, and was employed by him in navigating the Pacific Ocean, and in carrying passengers and freight between Panama and San Francisco. Two important facts must not be lost sight of: First, *The Moses Taylor* was a foreign vessel; and there never has been any question as to the jurisdiction of our Admiralty Courts to enforce the lien against foreign ships; and it has always been held for this purpose, that each state is considered as foreign to the rest: *The General Smith*, 4 Wheat. 438; *Pratt v. Reed*, 19 How. 859; *The Brig Nestor*, 1 Sum. 73; *Davis v. Child*, Davies 71; *Nickerson v. The Schooner Monson*, U. S. D. C. Mass., 5 Law Reporter 416; and second, that she navigated the high seas, and was seized at a foreign port: *North v. Brig Eagle*, Bee Adm. 78; *The Jerusalem*, 2 Gall. 345; *Zane v. The Brig President*, 4 Wash. C. C. R. 453. This case, therefore, comes directly under our admiralty jurisdiction, and is exclusively under it.

In the other case, *The Hine v. Trevor*, the ship *Hine* was a foreign ship, and was at a foreign port, and the collision, the cause of the suit, occurred on the Mississippi river, which places it also under the exclusive jurisdiction of our admiralty courts. In the first case the statute of California gave a lien upon all steamers and vessels, including foreign as well as domestic ships; in the other case the statute of Iowa gave a lien against any vessel found in the waters of that state, including also both domestic and foreign ships. Admiralty jurisdiction, in both of these cases, was exclusive; for the admiralty jurisdiction of the Federal courts as granted by the Constitution is not limited to tide-water, but extends wherever vessels float and navigation successfully aids commerce: *The Genesee Chief*, 12 How. 457, approved and affirmed by *The Hine v. Trevor*, 4 Wall. 563, and because the vessels in both cases were foreign vessels, at foreign ports, and not domestic ships at home ports: *The Schooner Marion*, 1 Sto. 68, 73; *Boon v. The Hornet*, Crabbé 426; *The General Smith*, 4 Wheat. 438; *Cole v. The Atlantic*, Crabbé 440; *Ex parte Lewis*, 2 Gall. 483; *Zane v. The Brig President*, 4 Wash. C. R. 453.

In *The Moses Taylor*, Mr. Justice FIELD, in delivering the opinion of the court, says, that "the statute of California, to the extent in which it authorizes actions *in rem* against vessels for causes of action cognisable in admiralty, invests her courts with admiralty jurisdiction;" and Mr. Justice MILLER, in delivering the opinion of the court in *The Hine v. Trevor*, after reviewing and affirming *The Moses Taylor*, says, "the state courts have been in the habit of adjudicating causes, which, in the nature of their subject-matter, are identical in every sense with causes which are acknowledged to be of admiralty and maritime cognisance;" * * * * "and if the facts of the case before us in this record constitute a cause of admiralty cognisance, then the remedy by a direct proceeding against the vessel belonged to the Federal courts alone, and was excluded from the state tribunals (4 Wall. 569). We therefore hold, from the authorities presented, that state statutes, which attempt to confer upon state courts remedies strictly *in rem* against foreign ships found in the waters of those states, are unconstitutional; because such statutes would be giving to state courts the right to exercise concurrent jurisdiction with the Admiralty Courts of the United States;

whereas, the grant of original admiralty jurisdiction, by the Act of 1789, is exclusive not only of all Federal courts, but of all state courts.

But, on the other hand, we contend, that a statute, passed by a state legislature giving the state courts a remedy by proceedings *in rem* to enforce the local lien of a material-man against a domestic ship in her home port—engaged in trade exclusively within the borders of said state—between ports and places of the same state—in the purely internal commerce of the state—the contract relating exclusively to that commerce, and which does not in any way affect trade or commerce with other states, is constitutional, and does not interfere with the exclusive jurisdiction of our admiralty courts, and is not the subject of admiralty jurisdiction, but concerns the purely internal trade of a state, the jurisdiction over which belongs to the courts of the state.

If, then, a state has no right to authorize actions *in rem* against vessels for causes of action cognisable in the admiralty—because a cause of admiralty cognisance belongs only to the Federal courts—the question arises, Have our admiralty courts any jurisdiction over domestic ships in their home ports?

We have seen in regard to domestic ships, that if the builder, or person making repairs, retains possession, he has a common-law lien; for this lien or "*privilegium*," by the civil law and the general maritime law, extends to ships without distinction between foreign and domestic vessels. But according to the admiralty law it is otherwise, and no lien is recognised on domestic ships: *Allen et al. v. Newbury*, 21 How. 244; *Maguire v. Card*, Id. 248.

By the old 12th Rule of the Admiralty material-men could proceed *in rem* against domestic ships, where the local law gave a lien to them for supplies, repairs, and other necessities. In May 1859, the old 12th Rule was amended, and the new rule declares that material-men may proceed *in personam*, but not *in rem*, no matter whether the local law gives a lien or not, against domestic ships for supplies, repairs, &c. Mr. Justice NELSON, in delivering the opinion of the court in the case of *Maguire v. Card*, says, "we have at this term amended the 12th Rule of the Admiralty, so as to take from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs, which had been assumed upon the authority of a lien given by

state laws, it being conceded that no such lien existed according to the admiralty law:" 21 How. 251.

In the case of *The N. J. Steam Nav. Co. v. The Merchants, Bank*, 6 How. 392, it was decided by the court that "the exclusive jurisdiction of the court in admiralty cases was conferred on the National Government as closely connected with the grant of the commercial power." * * * "It is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limits of the grant of the commercial power."

This decision has been approved and affirmed by two subsequent decisions. The first case was an appeal in admiralty from a decree of the District Court for the district of Wisconsin. The libel states that the goods in question were shipped at the port of Two Rivers in the state of Wisconsin, to be delivered at the port of Milwaukee in the same state; and the court held, that the admiralty jurisdiction "does not extend to a case where there was a shipment of goods from a port in a state to another port in the same state, both being in Wisconsin." * * * "The District Court of the United States had no jurisdiction over it in admiralty, but that the jurisdiction belonged to the courts of the state:" *Allen et al. v. Newberry*, 21 How. 246, 247.

The other case was brought up by appeal from the Circuit Court of the United States for the district of California, and the Supreme Court reversed the decree of the court below, and remitted the cause, with directions to dismiss the libel. It was a proceeding *in rem*, in the District Court of California against the steamer *Goliah*, to recover a balance of an account, for coal furnished to the steamer, under the lien law created by the statute of California. The steamer was engaged in trade exclusively within the state of California. In delivering the opinion of the court, Mr. Justice NELSON said, "We have determined to leave all these liens depending upon state laws, and not arising out of the maritime contract, to be enforced by the state courts. So in respect to the completely internal commerce of the states, which is the subject of regulation by their municipal laws; contracts growing out of it should be left to be dealt with by its own tribunals:" *Maguire v. Card*, 21 How. 251.

There is no conflict between the cases (*Allen et al. v. Newbury*

and *Maguire v. Card*) reported in 21 Howard, and the cases (*The Moses Taylor* and *The Hine v. Trevor*) reported in 4 Wallace. The court in *The Hine v. Trevor* decided, that "the state courts have been in the habit of adjudicating causes, which, in the nature of their subject-matter, are identical in every sense with causes which are acknowledged to be of admiralty and maritime cognisance; and it must be taken, therefore, as the settled law of this court, that wherever the District Courts of the United States have original cognisance of admiralty causes, by virtue of the Act of 1789, that cognisance is exclusive, and no other court, state or national, can exercise it." * * * "And if the facts of the case before us in this record constitute a cause of admiralty cognisance, then the remedy *in rem* against the vessel belongs to the Federal courts and was excluded from the state tribunals." In this case the *Hine* was navigating the Mississippi river, and engaged in commerce between the states, and was as between our states considered as a foreign vessel at a foreign port. The same facts control the case of *The Moses Taylor*. But in the two cases reported in 21 Howard, the vessels were not foreign vessels or vessels at a foreign port engaged in commerce between the states; but they were domestic vessels engaged entirely and distinctly in the domestic commerce of a state, which does not affect the rights and privileges of the commerce of other states, and which comes within the limit of the grant of commercial power, and strictly under the jurisdiction of the municipal laws of the states. These cases were not referred to in the opinions of the court in 4th Wallace, because the facts do not constitute a case of admiralty cognisance, but one which comes directly under the jurisdiction of the state courts.

Hence, we hold that a state has as much right and authority to pass a statute giving material-men a lien to be enforced *in rem* against domestic vessels which are engaged in commerce purely and completely internal—which is carried on between ports of the same state, and which does not extend to or affect other states, as well as she has the right and power to enact a statute creating a lien to be enforced *in rem* against a saw-mill, &c., situate in and carrying on business in the state; for by such statute she does not confer upon her courts jurisdiction concurrent with that of the United States Admiralty Courts; and does not in any manner, either in word or spirit of the Constitution, assume jurisdiction

over causes of action which, in the nature of their subject-matter, are identical in every sense with causes which are acknowledged to be of admiralty and maritime cognisance. The admiralty courts have no original jurisdiction over domestic ships at home ports, either under the Constitution of the United States, or by the Acts of 1789 or 1845, but have only exercised jurisdiction where the state laws gave liens, which jurisdiction it has been conceded does not exist, as there is no such lien existing according to the admiralty law (21 How. 251); and that there never has been any original jurisdiction in the United States relative to domestic ships: 21 How. 244, 246, 248, 250.

II. By the Constitution of the United States (Art. 1, § viii., clause iii.), it is declared that "Congress shall have power to regulate commerce with foreign nations, and among the several states," &c.; and, by Art. x., "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively." The government of the United States was eminently intended, among other purposes, to secure certain personal rights, and to exact certain personal duties. The Constitution confers upon the General Government a few special powers, but it confers them in order that the General Government may accomplish, for the people of each state, the advantages and blessings for which the state governments are presumed to be inadequate. It lays upon the people of the states and the government certain restrictions, and lays them for the protection of the people against an exercise of state power, deemed injurious to the general welfare. When the Constitution was framed, on account of the relation of maritime commerce to the intercourse of the people of the United States with foreign nations, or to the intercourse of the people of different states with each other, the whole civil as well as criminal jurisdiction in admiralty, original as well as appellate, was given by the states to the government of the Union, subject, however, to the powers reserved to the states under the Constitution, and which were not by them granted to the General Government: Curtis on Const. vol. 2, 445, *et seq.* And one of the powers expressly reserved by the states, and not ceded by them to the government, is the power and right to regulate and control their internal commerce. For, by the Constitution, "Congress shall have power to regulate commerce with foreign nations and among

the several states," &c.; not to regulate the commerce of each state; and "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively." It has never been questioned that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded to be a fundamental principle in the political organization of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people, of course, possess all legislative powers originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular state in question: *Thorpe v. The Rutland and Burlington Railroad Co.*, Law Mag. Jan. 1856, opinion of C. J. REDFIELD.

In *Maguire v. Card*, and *Allen v. Newberry*, it was held, that under the Act of 1845 (5 U. S. Stat. at Large 726) the admiralty courts had no jurisdiction over the domestic commerce of a state, and that the restrictions mentioned in said act are declaratory of the general law, and that they existed independently of that statute. By this act the jurisdiction of the admiralty courts is confined "to matters of contract and of tort arising in, upon, or concerning steamboats and other vessels, employed in business of commerce and navigation between ports and places in different states," &c. The court held "this restriction of the jurisdiction to business carried on between ports and places in different states was doubtless suggested by the limitation in the Constitution of the power in Congress to regulate commerce." "There certainly can be no good reason," says the court, "for extending the jurisdiction of the admiralty over this commerce * * * for, according to the true interpretation of the grant of the commercial power in the Constitution to Congress, it does not extend to or embrace the purely internal commerce of a state; and hence that commerce is necessarily left to the regulation under state authority:" 21 How. 246, 247. It was held in *Gibbon v. Ogden* that this power did not extend to the purely internal commerce of a state. Chief Justice MARSHALL, in delivering the opinion of the court in that case, observed: "It is not intended to say that these words comprehend that commerce which is completely

internal, which is carried on between man and man in a state, or between ports of the same state, and which does not extend to or affect other states. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, when they do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself:" 9 Wheat. 194.

And, therefore, if the regulation of its internal commerce is reserved for the state itself, all powers and means necessary to that regulation, control, and government must necessarily follow. And if a state has the power to enact a law giving material-men a lien against domestic ships engaged in trade exclusively within the state (which is strictly within the power to regulate *internal commerce*, 21 How. 244, 248), it must necessarily have the power to prescribe the remedy by which the lien can be enforced and made effectual; for in order to invest the statute with force and effect, it must be held that such a statute gives not only a right, but a remedy, and that the lien should be enforced in the manner pointed out by the statute.

But, although the state legislatures have a right to give a lien where none before existed, it is very clear that they have no power to confer any additional jurisdiction upon the United States courts. The grant of admiralty jurisdiction to the District Courts of the United States by the 9th section of the Act of Congress, September 24th 1789, is co-extensive with this grant in the Constitution, declaring "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction" (4 Wall. 411, 555), subject to the power reserved by the states to regulate and control their own internal commerce: 9 Wheat. 194, 195; 6 How. 392; 21 Id. 244, 248. And if the Constitution gives to the United States courts exclusive jurisdiction of all admiralty cases—which was one of the powers specially delegated to the government under the Constitution—it is clear that the state cannot in any way confer by statute any additional jurisdiction upon these courts: *The United States v. Judge Peters*, 5 Cranch 115.

If then there are no liens of material-men recognised by the

admiralty courts of the United States against domestic ships at their home ports, and that the admiralty courts have no original, and necessarily, no exclusive, jurisdiction over such liens, and that such liens have their origin and foundation in state laws, and that the District Courts, for want of jurisdiction, have not the right to proceed *in rem* against domestic ships to enforce liens given by state laws for supplies, repairs, &c., how are these state liens to be enforced? In the words of the Supreme Court (21 How. 251), we answer, "all these liens depending upon state laws must be enforced by the state courts."

And who will doubt the right of a mechanic, who has performed repairs upon a domestic ship, or one who has furnished supplies or other necessities to a domestic ship, engaged in the internal trade and commerce of his state, to enforce *in rem* a state lien against said ship in pursuance of the laws of his state? Will it be, for one moment, argued that because admiralty has no jurisdiction over such a lien, therefore the state courts can have none? Or that because admiralty has no jurisdiction, it can nevertheless prevent the state courts from exercising such jurisdiction, on the ground that, if there is any such jurisdiction, it must belong to the admiralty courts on the principle of exclusive jurisdiction? Or that because the admiralty courts assume jurisdiction, though against the Constitution, and against the true interpretation of the grant of the commercial power in that Constitution to Congress, therefore the state courts are powerless to enforce the statutes of their states?

We think the law is clear as decided by the Supreme Court of the United States; and that the state legislatures have the power to pass a law giving a lien—when it is not in the nature of its subject-matter identical in every sense with causes which are acknowledged to be of admiralty and maritime cognisance—to material-men against domestic ships employed entirely in the internal trade and commerce of the state; and that such liens can be enforced *in rem* against such ships by the state courts, and that such proceedings are not in conflict with the Constitution of the United States, and do not in any way interfere with the exclusive jurisdiction of the admiralty courts, not in any manner whatever conferring concurrent jurisdiction on the state courts with the courts of admiralty. And further, that the jurisdiction of the state courts to enforce such lien laws is an original jurisdiction, vested in the state courts by the state legislatures, inde-

pends of the Constitution of the United States, belonging to that original legislative power which is vested in the people, which they never have delegated to the General Government, and which they have in the most general and unlimited manner committed to the several state legislatures.

J. H. T.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

THE PENNSYLVANIA RAILROAD CO. v. BOOKS.

In an action against a railroad company for injury caused by an accident, evidence that the conductor was intemperate or otherwise incompetent is admissible to raise a presumption of negligence.

Admissions or declarations of the employees of the company, made subsequently to the accident, are not competent evidence. Such declarations are only competent as part of the *res geste*.

The declarations of an officer of the company stand upon the same footing.

In an action for damages by a person injured by negligence, evidence of the number of plaintiff's family or of his habits and industry is not admissible unless special damage is averred.

It is no justification for the employment of an incompetent servant that competent ones were difficult to obtain.

Where a person injured by a railroad accident had accepted a ticket or pass describing him as "route agent, an employee of the Railroad Co.," this pass is competent evidence for the company, but it does not estop the plaintiff from showing that he was not, in fact, an employee of the company.

In an action for injury by negligence the damages should be compensation for the actual injury, and it is error to leave the measure and amount of damages, as well as the rules by which they are to be estimated, entirely to the jury.

WRIT of error to Common Pleas of *Snyder county*.

The plaintiff was a United States mail agent, employed by the Post-Office Department to take charge of mails on the cars of the defendant company.

While on the train an accident occurred by which he was injured, whereupon he brought an action upon the case for damages.

Plaintiff recovered a verdict, and defendant took this writ of error upon points which sufficiently appear in the opinion of the court.

Miller & Doty and Cuyler, for plaintiff in error.

Miller & Parker, for defendant in error.

The opinion of the court was delivered by

SHARSWOOD, J.—This was an action by the plaintiff below against the defendants, the plaintiffs in error, to recover damages for injuries alleged to have been occasioned by the negligence of their servants. Nine errors have been assigned, which it is our duty to consider.

The 1st is that the court erred in admitting testimony, touching the habits and competency of the conductor of a coal train, in the employ of the company, which had run into the passenger train and caused the injury. This assignment of error was not pressed, and properly. If by direct evidence it appeared that the conductor was a man of intemperate habits, it would cast upon the defendants the burthen of proving that he was not intoxicated at the time and had used proper care. It is certainly incumbent upon railroad companies to employ none but sober men on their roads. Where a habit of intoxication in a conductor is shown, it raises, in the case of an accident, a presumption of negligence, which stands until it is rebutted.

The 2d assignment of error is, that the learned judge erred in admitting evidence of statements of the flagman made subsequent to the accident. The plaintiff proposed to ask a witness if the flagman showed him how far he had gone back to flag the fast line. This was admitted, and an exception sealed. The rule is well settled, that what an agent says, while acting within the scope of his authority, is admissible against his principal, as part of the *res gestæ*, but not statements or representations made by him at any other time: *Shelhamer v. Thomas*, 7 S. & R. 106; *Levering v. Rittenhouse*, 4 Whart. 130; *Jordan v. Stewart*, 11 Harris 244. The admissions of an agent, not made at the time of the transaction, but subsequently, are not evidence. Thus, the letters of an agent to his principal, containing a narration of the transaction, in which he had been employed, are not admissible against the principal: *Hugh v. Doyle*, 4 Rawle 291; *Clark v. Baker*, 2 Whart. 340. Naked declarations, which are not part of any *res gestæ*, are mere hearsay, like words spoken by a stranger: *Patton v. Minesinger*, 1 Casey 393. The flagman himself was a competent witness, but his statement of what he had done was clearly

incompetent. There was error, therefore, in the admission of this evidence.

The 3d error assigned is in admitting evidence of statements made by the vice-president of the company. The plaintiff offered to ask a witness what Mr. Lombaert said about the railroad company receiving pay for carrying the mails. This was objected to, but the objection was overruled, and an exception taken. Declarations made by the officers of a corporation rest upon the same principles as apply to other agents. In a case where the admissions of the trustees of a religious corporation were offered in evidence, C. J. TILGHMAN said: "An agent is authorized to act; therefore, his acts, explained by his declarations during the time of action, are obligatory on his principal, but he has no authority to make confessions after he has acted, and, therefore, his principal is not bound by such confessions: *Magill v. Kauffman*, 4 S. & R. 321; *Spalding v. The Bank of Susquehanna County*, 9 Barr 28. So it has been ruled that in an action by a bank, evidence of the parol declarations of the officers of the bank is not admissible for the defendant, without proof of the particular officer's being authorized by the board of directors to speak for them, even though it should appear that the board kept no regular minutes of their transactions: *Stewart v. The Huntingdon Bank*, 11 S. & R. 267. In like manner declarations made by a person, who had been president of a bank, respecting payments made on a note, are not evidence against the bank: *Sterling v. The Marietta and Susquehanna Trading Co.*, 11 S. & R. 179; *Bank of Northern Liberties v. Davis*, 6 W. & S. 285. The decision in the case of *The Harrisburg Bank v. Tyler*, 3 W. & S. 373, does not conflict with these authorities—for the declaration of the cashier was received in that case as evidence that the bank had knowledge of a trust, and it was in the performance of those functions, which peculiarly belong to that officer in the current transactions of its business: *Hazleton Coal Co. v. Megargel*, 4 Barr 329. This assignment of error is, therefore, sustained.

The 4th error assigned is, that the learned judge erred in admitting evidence of the number of plaintiff's family, his habits, industry, and economy, as affecting the question of damages. In *Laing v. Colder*, 8 Barr 479, it was ruled, in a case of injury to the person, that damages sustained by the plaintiff, from the cir-

cumstance of his being the head of a family dependent upon him, have no necessary connection with the injury. Such damages may or may not follow a temporary bodily disability. Damages of this nature are, therefore, not direct or necessary, but special as being possible only, and must be specially averred to let in evidence of them. It is difficult also to see what bearing the plaintiff's habits, industry, and economy could legitimately have on the damages. They might be important in a proceeding under the Act of April 26th 1855 (Pamph. L. 809),¹ but in an action by the injured party himself they were irrelevant, and tended only to excite feelings of commiseration and sympathy in the breasts of the jurors, and to inflame unjustly the damages—results which in all actions of this character ought carefully to be avoided.

The 5th error is in excluding testimony offered by the defendants below touching the efforts made by them to secure competent train hands. We think the court was right in excluding this testimony. It was no justification or excuse to the company in employing an intemperate or incompetent man in a business involving such peril to life and limb, that hands were scarce. For a sufficiently high rate of compensation sober and competent men are always to be had. Such evidence, if admitted, would necessarily lead to collateral issues far wide of that on trial. We think there was no error in this ruling.

The 6th error assigned is in excluding from evidence the employee's pass, upon which the plaintiff was riding. The ticket produced was in these terms: "Employee's monthly pass. Pennsylvania Railroad Co. Pass S. Books, Route Agent, an employee of the Pennsylvania Railroad Company." The evidence offered was of course to show that the plaintiff accepted and used this ticket. It certainly was an admission by him that he bore to the plaintiffs in error the relation of an employee or servant. It was not indeed conclusive—not an estoppel—if explained so as to show that he was really not in the employ of the company, but, as was alleged, received and used the ticket as a route agent in the service of the post-office department of the government of the United States under a contract between that department and the company for carrying the mails. Standing alone, uncontradicted and unex-

¹ Action by widow or personal representatives for negligence causing death.

plained, the pass would have been sufficient to show that the relation existed between the company and the plaintiff stated on its face, and it was admissible no matter what evidence to the contrary had been previously given. The plaintiffs in error had a right to have the whole evidence go to the jury, as it would then have been a question for them, and could not have been shut out from their consideration, as it was by the judge in his answer to their 7th point. This assignment of error is therefore sustained.

The 7th error assigned is, that the learned judge erred in his instructions to the jury on the subject of damages, and in his answers on the same subject to the ninth and tenth points presented by the defendants below. After laying down a measure, which is not objected to here, and on which, therefore, we give no opinion, he added, "These we think would be fair rules to ascertain the measure of damages the plaintiff would be entitled to in this case; but if you can find any better ones than those suggested you are at liberty to adopt them, as the measure and amount of damages are entirely for you to ascertain, under all the evidence and circumstances in the case." The effect of this language was to leave the measure of damages entirely in the discretion of the jury. The general rule in actions on the case for negligence is that the party aggrieved is entitled to recover only to the extent of his actual injury. In the case of a suit by the party injured himself, it may no doubt include a reasonable compensation for pain and suffering, as well as the expense of medical attendance and the loss of time consequent upon confinement. But in these cases, as well as in those brought under the Act of April 26th 1855, unless the injury has been wantonly inflicted, when exemplary damages may be given, the jury must be confined to damages strictly compensatory. "Injuries to the person consist in the pain suffered, bodily or mental, and in the expenses and loss of property they occasion. In estimating damages, the jury may consider not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured and any incurable hurt inflicted." Per BELL, J., in *Laing v. Colder*, 8 Barr 481. There was error therefore in this instruction.

The objection to the answer to the 9th point has not been pressed, and very properly. We see no error in it. The 10th point was "that if the court should be of opinion that plaintiff may recover, then the measure of damages would be the pecuniary loss he has sustained

in consequence of the injuries received." The answer was: "This is not the entire measure of damages you can give the plaintiff, if you believe this occurred from the gross negligence of the defendants' agents." The court might with more accuracy and propriety have simply negatived the point, for it was not true, whether the negligence of the defendants' agents was gross or otherwise. There is, therefore, no error in this answer of which the plaintiffs in error have any right to complain.

As to the 8th assignment of error, we think the learned judge was clearly right in his answers to the third, fourth, and fifth points presented by the defendants below. Every one riding in a railroad car is presumed *prima facie* to be there lawfully as a passenger, having paid or being liable when called on to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser. So as to the 9th error assigned, the employee's pass having been excluded, though we think improperly, there was no evidence that the plaintiff was an employee of the company.

Judgment reversed, and *venire facias de novo* awarded.

Supreme Court of Pennsylvania.

HAYCOCK, ADMR. OF SHIVE, v. GREUP.

When specimens of handwriting, admitted or proved to be genuine, are offered to prove by comparison the genuineness of the writing in issue, the comparison can only be made by the jury.

Such evidence is competent only as corroborative of other proof; it is not admissible as independent proof.

On an issue to determine the genuineness of a signature of A., specimens of B.'s writing in which the name of A. occurs are not competent independent evidence to prove by comparison that the signature of A. was written by B. Nor is the opinion of a witness that the signature was not written by A. any foundation for such proof that it was written by B.

Whether such testimony would be competent even in corroboration of other testimony that B. had written the signature in issue, doubted by STRONG, J.

A sealed special verdict so expressed as to be ambiguous may be reformed and moulded by the court in presence of the jury, without sending the jury out to reconsider it.

WRIT of error to the Common Pleas of *Lehigh county*.

Peter Shive, the defendant's intestate, made deposits in the

Dimes Saving Institution, receiving certificates of deposit. After his death suit was brought on these certificates by John A. Greup, who claimed them by virtue of an assignment upon them as follows:—

“For value received, I assign the within note to John A. Greup, this 10th of August 1864. “PETER SHIVE.”

The administrators of Peter Shive denied the genuineness of the signature of Peter Shive to these assignments, and suits having been brought against the Dimes Saving Institution, an agreement was entered into, to try the following questions, to wit: 1st, Whether the assignment of the certificates of deposit were in the handwriting of Peter Shive. 2d, Whether the said certificates if so signed by the said Peter Shive were delivered to John A. Greup, during the lifetime of the said Peter Shive. 3d, Whether, if the assignments were so signed and delivered, a valuable consideration passed between the said Shive and the said Greup.

On the trial the defendant offered “to prove the handwriting of John A. Greup, and to establish the genuineness of several specimens in which the name of Peter Shive has been written by said John A. Greup, the plaintiff, in order to submit the said specimens to the jury to compare with the signatures in dispute on this trial, averred to be the signatures of Peter Shive.”

This offer the court rejected, whereupon the defendants offered “to prove that the signatures to the assignments are in the handwriting of John A. Greup, and for the purpose of proving this fact, they offer in evidence specimens of the handwriting of John A. Greup, in which he has written the name of Peter Shive, to be submitted to the jury to compare with the signatures to the assignments in suit.”

This offer was also rejected. These rulings of the court were assigned for error.

The jury were instructed to find a special verdict, and after deliberation brought into court a sealed verdict in the following words:—

“1. We agreed to detrum wether the assignment of the certificates of deposits upen wich suut wure brought is in the proper handwritening of Peter Shive their estate.

2. We agreed wether the said curtificuts, is so signed by the said Peter Shive, wether the same were delived to the said John A. Greup.

3. We agreed for value during the lifetime of the said Peter Shive. Verdict in favor of the Plaintiff."

The court, without sending the jury back to their room to correct their verdict, changed the same at bar, under exception from the defendants' counsel, and asked them whether the following was their intended verdict, to wit:—

"1. That the signatures are in the proper handwriting of Peter Shive.

2. That the certificates were delivered to John A. Greup in the lifetime of Peter Shive.

3. That the same were delivered to John A. Group for value."

The jury assenting to this the court entered it as their verdict. This action was also assigned for error.

John D. Stiles, for plaintiffs in error, cited *Farmers' Bank v. Whitehill*, 10 S. & R. 110; *McCorkle v. Binns*, 5 Binn. 349; *Lodge v. Phipper*, 11 S. & R. 334; *Travis v. Brown*, 7 Wright 9; Greenl. on Ev. § 581. On the matter of the verdict, he argued that the judge should have sent the jury out to reform their verdict, and not altered it himself, citing *Reitenbaugh v. Ludwick*, 7 Casey 132, to show the practice in such cases.

John H. Oliver, for defendant in error.

The opinion of the court was delivered by

STRONG, J.—In this state the rule respecting proof of handwriting in civil cases, by comparison of it with other writings admitted to be genuine, or proved to be genuine beyond a doubt, appears to be this: The comparison can be made only by the jury, and it is not allowed as independent proof. It can be used only as corroborative. After evidence has been adduced in support of a writing, it may be strengthened by comparing the writing in question with other genuine writings, indubitably such. Beyond this our cases do not go: *Bank v. Whitehill*, 10 S. & R. 110; *Travis v. Brown*, 7 Wright 9. And this is a departure from the English rule, which excludes other writings entirely, when offered for the mere purpose of enabling the jury to judge of the handwriting by comparison, for reasons that must be admitted to have great weight. But even under our relaxed rule the evidence offered in this case and rejected was inadmissible. The question at the trial was whether Peter Shive had signed certain assign-

ments of certificates of deposit, purporting to have been made to John A. Greup, the defendant in error. After he had given considerable evidence to show that the signatures were in the handwriting of Shive, and had rested his case, the plaintiff in error called a witness who testified to his belief that the signatures to the assignments were not those of Peter Shive. They then offered to establish the genuineness of several writings in which the name of Peter Shive had been written by John A. Greup, in order to submit them to the jury to compare with the signatures to the assignments. This being rejected, they renewed their offer in another form. They proposed to prove that the signatures to the assignments were in the handwriting of John A. Greup, and as the means of such proof they offered in evidence specimens of the handwriting of Greup, in which he had written the name of Peter Shive, to be submitted to the jury for comparison with the signatures to the assignments. This offer was also rejected.

Up to the time when these offers were made there was no evidence whatever that Greup had forged the name of Shive, or that the signatures were in Greup's handwriting. No witness had expressed such a belief, or intimated a suspicion to that effect. The evidence offered was not then corroborative of anything that had previously been proved, or of anything with which it was proposed to follow it. Assuming, as we do, what does not clearly appear, that the offer was to establish indubitably the genuineness of Greup's handwriting in the specimens, yet, when that was established, they could not have been received until ground had been laid for their introduction by other proof that Greup wrote the signatures to the assignments of the certificates. Were this not so, they would be primary and independent evidence of a fact, when the law declares them admissible only as corroborative. True, when the offers were made, it was alleged that Greup signed the name of Shive, but it was alleged without evidence, and there was, therefore, nothing more than an allegation to be corroborated. The belief of a witness that the signatures to the assignments were not in the handwriting of Peter Shive was not the first step toward proving that Greup wrote them. For myself, I doubt whether if there had been some evidence that the signatures to the assignments were written by Greup, it could have been corroborated by comparison with other specimens of his writing, admitted or clearly proved to be genuine. No case in our books has gone to

that length, and so broad a doctrine has never been asserted. Even then it would have been allowing the jury to draw an inference of one fact, from another fact, itself only an inferential conclusion. For the question in this case was whether Peter Shive wrote the signatures. It is, however, not necessary to decide this.

If the testimony was admissible in this case the plaintiffs in error might have gone on and submitted specimens of the handwriting of other persons A., B., C., and D., indefinitely, specimens selected by themselves, that the jury might determine from comparison whether some one of them had not written the signatures, and therefrom infer that Peter Shive had not. The danger of fraud in the selection of specimens, and the danger of surprise to the opposite party, are too great to warrant the allowance of any such instruments of proof. The 1st and 2d assignments of error are not sustained.

The 3d assignment is, that the court directed a verdict different from the finding of the jury. We do not understand such to have been the fact. The verdict is the one rendered in court, not that which had been sealed up and brought in. The paper brought in by the jury in this case was exceedingly unlettered, but it was a general verdict for the plaintiff below, and without asking an explanation from the jury the court might have moulded it into the form in which the verdict was recorded. The court simply asked an explanation, and it was given in open court. Then the jury declared that they meant to find what the record shows their verdict to have been. In all this we discover no error.

Judgment affirmed.

United States Circuit Court, Southern District of New York.

ARCHIBALD HOPKINS v. ALEX. F. WESTCOTT ET AL.

A person receiving a printed notice on his ticket or check at the time of delivering his goods to a carrier is to be charged with actual knowledge of the contents of the printed notice.

Where such a notice stated that the carrier would not be responsible "for merchandise or jewelry contained in baggage, received upon baggage checks, nor for loss by fire, nor for an amount exceeding \$100 upon any article, unless specially

agreed for," &c., the words "any article" mean any *separate* article, not a trunk with its contents. The language bears that construction, and must be taken strictly against the carrier.

Therefore, a traveller who gave a single trunk to a carrier and received such a notice, was allowed to recover the value of separate articles in the trunk amounting to \$700.

Baggage includes such articles as are usually carried by travellers. Books and even manuscripts may be baggage, according to the circumstances and the business of the traveller.

In this case a student going to college was allowed to recover the value of manuscripts which were necessary to the prosecution of his studies.

THIS was an action against an express company for loss of baggage. The following facts were agreed upon:—

The defendants are carriers of baggage in the city of New York.

The plaintiff delivered to the defendants a railroad baggage-check to enable them to obtain his trunk at the depot, and deliver the same at his residence in the city, no rate of compensation being named.

The defendants obtained the trunk, but lost it.

Upon the delivery of the check to the defendants, they delivered to the plaintiff a paper upon which the number of the check was indorsed, and which contained also the following printed matter: "The Westcott Express Company will not become liable for merchandise or jewelry contained in baggage received upon baggage-checks, nor for loss by fire, nor for an amount exceeding \$100, upon any article, unless specially agreed for in writing on this check-receipt, and the extra risk paid therefor * * * And the owner hereby agrees that the Westcott Express Company shall be liable only as above." This printed matter, however, the plaintiff did not read at the time it was delivered to him, nor till after notice from the defendants that his trunk was lost.

The general custom of express companies is to charge forty cents for every trunk, and twenty-five cents in addition for every \$100 of value beyond \$100. Plaintiff was ignorant of this custom.

The defendant was a student at Columbia College, and was proceeding to New York for the purpose of prosecuting his studies at that institution; and certain manuscript books which formed part of the contents of his trunk, were necessary to the prosecution of his studies.

SHIPMAN, J.—It has been remarked by a learned and accurate

writer, "that a common carrier may qualify his liability, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part in regard to the manner of entry and delivery of parcels, and the information to be given him of their contents, the rates of freight, and the like; as, for example, that he will not be liable for goods above the value of a certain sum, unless they are entered as such and paid for accordingly:" 2 Greenleaf's Ev. § 215. But in the case now before the court, the defence does not rest upon a general notice, constructive knowledge of which the plaintiff is to be charged with by proof that it was generally and widely promulgated. It rests on a special printed notice, put into the hands of the plaintiff at the time he delivered his check to the defendants. It can make no difference that the plaintiff did not choose to read it until after he had notice that his trunk was lost. He received it at the time he parted with his check; it was legibly printed, and he must be charged with actual notice of its contents. By its terms it qualified the duty or liability of the defendants, and limited their responsibility in case of loss to an amount not exceeding \$100 for any article, unless the plaintiff should disclose such articles, and have the fact indorsed on the paper, as well as pay for the extra risk. It excluded all liability for merchandise and jewelry. Though, as will be seen in the sequel, this point is of no practical importance in this suit, in view of the construction which I shall give this notice, yet I am unwilling to leave it to be inferred that I entertain any doubt of the power of the carrier to qualify his responsibility by special notice actually given to the owner under circumstances like these. In *The Orange County Bank v. Brown*, 9 Wend. 115, Judge NELSON, speaking for the court, says of the carrier: "If he has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance is paid, such notice, if brought home to the knowledge of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual in qualifying the acceptance of the goods as a special agreement, and the owner must, at his peril, disclose the value and pay the premium." Here, in the case before us, we are not left to a general notice to be charged upon the plaintiff on the ground of its general publication, and which, though he had seen, he might have forgotten;

but the notice was served upon him at the time he sought the services of the carrier. I can have no doubt, therefore, that the plaintiff was bound by the notice, and that the carrier incurred no responsibility which his notice, properly construed, excluded. But here a more difficult question presents itself. The list of the contents of this trunk and the value of each article thereof are agreed to, and they amount in the aggregate to \$744.10. It was contended on the argument that the notice limited the liability of the carrier to \$100, unless a greater value was disclosed, and that, as no greater value was disclosed, judgment should be rendered for that sum only. But so far from giving this notice a liberal construction in favor of the carrier, I am inclined to construe it strictly against him. The rule which holds carriers to strict responsibility is founded upon high considerations of public policy and the security of the property of travellers. Every limitation of this responsibility should be expressed in each case in clear and unequivocal terms. Notices of this character should, therefore, be construed strictly against the carrier. They are given to travellers of all ages and sexes, in the bustle of rapid transit from one place to another, in crowded vehicles and depots, and they should be free from all doubt or ambiguity, so that their contents should be clearly apprehended at a glance. Now, some portions of the defendants' notice in this case are clear and explicit. It declares that they will not be liable for merchandise or jewelry contained in baggage received upon baggage-checks. No matter what their value, they do not choose to engage in the transportation of such articles as baggage. They further give notice that they will not be liable for losses by fire. Where there is no question of gross or wilful neglect, or recklessness, or malfeasance, or misfeasance, these restrictions being plainly expressed and communicated to the owner at the time of the engagement, without doubt are binding upon him. But after designating merchandise and jewelry, and exempting them, as well as losses by fire, the notice adds: "Nor for an amount exceeding \$100 upon any article unless specially agreed for in writing on this check-receipt, and the extra risk paid thereon." The question arises, whether the term "any article" here refers to a trunk or piece of baggage and its entire contents in gross; or whether it is to be confined to each separate article contained therein. In other words, does it limit the liability of the carrier for the loss of a

trunk and its contents, or does it leave him liable for each article contained in the trunk, according to its value, not exceeding \$100 for any single item? The terms "merchandise" and "jewelry" refer expressly to articles "contained in baggage received upon baggage-checks"—that is, to the contents of trunks and packages, and excludes liability upon the articles specified. When limiting the liability to \$100 upon any one other article, I think it should be held also to refer to the separate contents of the trunks or packages, and not to the whole in gross. This strict construction is in harmony with the policy of the law, and essential to the protection of the community in view of the constant devices of carriers to escape the responsibilities of their calling, while their eagerness to obtain the patronage of the public remains unabated. Now I can well conceive that they are unwilling to take the risk of carrying expensive articles of dress, such as costly furs, shawls, and other valuable paraphernalia of an extravagant modern wardrobe, a single item of which is often valued at many hundreds of dollars, without notice of value and pay for the risk. But it may well be doubted whether they intend by such notices as the one under consideration to apprise the owner that they decline all responsibility beyond \$100 on each trunk and its contents, unless a special contract is made. A good trunk is worth half that sum, and often more, and the value of an ordinary traveller's trunk and necessary contents would usually exceed that sum. But whatever be the intentions of carriers, they must be so expressed as to leave no room for doubt as to their meaning, or they cannot be permitted to qualify their liability as fixed by the general rules of law applicable to their calling. As was remarked by BEST, C. J., in *Brooke v. Pickwick*, 4 Bing. 218, "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies to their office, and at the same time to place in his hands a printed paper specifying the *precise extent* of their engagement." And certainly where they make no oral communication, but merely thrust into the hand of the traveller a small printed ticket, the notice which that contains should be explicit, and leave nothing to be made out by construction. Where there is any doubt as to its meaning, it should be construed strictly as against the carrier.

As to the general custom of express companies to charge extra

for every package over \$100 in value, I do not think that has any bearing on this case. Even admitting that they could change their liabilities by a sweeping custom (which may well be doubted), no price was demanded or named in this case, and, therefore, the custom has no bearing upon the controversy. Among the contents of this trunk were five manuscript books, no one of which exceeded in value \$100, but the defendants insist that they are not liable at all for these, on the alleged ground that they cannot be properly termed baggage. In *Hawkins v. Hoffman*, 6 Hill 589, Judge BRONSON remarks: "An agreement to carry the ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveller usually has with him as a part of his luggage. It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not mean to say that the articles must be such as every man deems essential to his comfort, for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razor, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This, I think, a good test for determining what things fall within the rule." Now, it may safely be said that books constitute to some extent a part of the baggage of every intelligent traveller, and especially is this the case with scholars, students, and members of the learned professions. There is no reason why they should not be under the protection of the law as against the negligence of carriers, as well as any other portions of their luggage.

But, it is said that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and, in my researches, I have found none. But I see no reason for adopting a rule by which they should be excluded under all circumstances from the list of articles termed baggage. With the lawyer going to a distant place to attend court, with the author proceeding to his publishers, with the lecturer travelling to the place where his engagement is to be fulfilled, manuscripts often

form, though a small, yet indispensable, part of his baggage. They are carried as such, in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey, and, as they are carried with his baggage in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or fishing-tackle. In the present case the manuscript books lost are admitted to be necessary articles for the student at the institution to which he was proceeding. They must, under all the circumstances, be deemed a part of his baggage, for which the defendants are liable. There was one article of jewelry in the list for which, of course, they are not responsible, as all jewelry was excepted by specific designation. This, however, will make no difference with the amount of the judgment, as by the stipulation of the parties it is not to exceed \$700, the sum demanded in the declaration, and the aggregate of the agreed value of the list is \$744.10. Let judgment be entered for the plaintiff for \$700, with costs.

Circuit Court of the United States, Northern District of Illinois.

DION BOURCICAULT v. JOSEPH H. WOOD.

Under the Act of 1856 an author who has filed a copy of his title-page but not yet published his play, may have an action at law for damages for the representation of his play without his consent.

A *resident*, in the meaning of the Copyright Acts, is a person *domiciled* in this country, not a mere sojourner.

In an action for infringement of copyright in a play, the copyright and the fact of representation being established, the burden is on defendant to show the author's consent to the representation. Mere publication is not permission to perform it.

A foreigner, resident in this country, who has filed a copy of the title-page of a play, but has not published, is entitled to the protection of the Copyright Laws, but a subsequent publication in a foreign country would be an abandonment of his rights under the Copyright Act of this country.

If there has been no publication at all by the author of a play, he has a right at common law to damages for the representation of his play from a manuscript obtained without his consent.

DION BOURCICAULT, the plaintiff, a foreigner, resided in the United States from 1854 to 1861, and, whilst in New York, composed and took measures to copyright three plays, "*Pauvrette, or the Avalanche*," "*The Octoroon*," and the "*Colleen Bawn*."

He deposited the printed title-page of "Pauvrette" in the clerk's office of the District Court of the Southern District of New York, in September 1858, printed the book in October 1858, and at that time deposited a printed copy of the work, as provided by law, in the same clerk's office.

He deposited the title-page of "The Octoroon" with the clerk on December 12th 1859, and of "The Colleen Bawn" March 28d 1860, and *never printed or published* either of these two.

Wood, the defendant, in 1864, 1865, and 1866, was proprietor of "Wood's Museum," in Chicago, in which at various times during these years he caused the above three plays to be represented without license from Bourcicault.

This was an action on the case to recover damages for the wrongful representation of these plays.

The declaration contained seven counts.

1. A count as to "Pauvrette," alleging the steps taken to secure the copyright, and the infringement.

2. As to "The Octoroon," alleging the deposit of the title-page, and that the play *had never been published* by plaintiff, or with his consent, and the infringement.

3. As to "The Colleen Bawn," substantially the same as the 2d count.

4. A count at common law, alleging that the plaintiff is the author and proprietor of "The Octoroon," a play never published by him nor with his consent, nor ever generally given to the public by him, but still in manuscript, from the representation of which, by his license, he has derived profit. That the defendant, without having been able to do so from any previous representation of it, nor from memory, nor from its production to any audience, but solely from a manuscript copy of it surreptitiously and wrongfully obtained, represented it at various times at his theatre.

5. A count at common law similar to the 4th, as to "The Colleen Bawn."

6. A count at common law as to "The Octoroon," similar to the 4th, with the difference that it alleged that the defendant produced it from a *printed copy* wrongfully and surreptitiously printed by some one unknown to the plaintiff, and without his consent, and surreptitiously obtained by defendant.

7. A count at common law similar to the 6th, as to "The Colleen Bawn."

The plea was the general issue, as provided by statute, and the defences made under it, without and with notice, were:—

1. That at the time he sought to copyright the plays plaintiff was not a *resident* of the United States, within the meaning of the Act of 1831.

2. That no sufficient steps had been taken by him to secure a copyright.

3. That he had not deposited a *printed copy* of "The Octoroon" and "The Colleen Bawn," in the clerk's office.

4. That, to secure his copyright on "The Octoroon" and "Colleen Bawn," *they must have been printed and published.*

5. That Mr. Bourcicault has for years allowed these plays to be performed all over the country, and has permitted printed copies of "The Octoroon" and "Colleen Bawn" to be sold by publishers and booksellers without restraining or prosecuting them, and has, therefore, *abandoned* all his rights to them, if any he had, as well under the statutes of the United States as at common law.

6. That the action (on the case) could not be maintained, the only remedy being in equity.

Joseph P. Clarkson, for plaintiff.

Geo. C. Bates, for defendant.

DRUMMOND, J., charged the jury as follows:—

The Act of 1831 protected the author of any book in the right to print and publish such book, provided he was a citizen of the United States, or a resident therein. The fourth section of that act declared how such author should proceed, in order to make that protection available to him. It declared that he should not be entitled to the benefit of the act unless, before publication, he deposited a printed copy of the title of the book in the clerk's office of the District Court of the district wherein he resided.

The fifth section declared that no person should be entitled to the benefit of the act unless he gave information of the copyright being secured, by causing to be inserted in the copy of each and every edition published, during the term secured, on the title-page or the page immediately following it, a notice of the fact of such

right being secured to him, and the words by which such notice was to be given were specified in that section.

The sixth section of the act provided for the recovery of certain penalties if any person or persons, *after the recording of the title of the book*, should publish, import, or cause to be printed or imported, any copy of such book, without the consent of the person legally entitled to the copyright thereof first had in writing, and a forfeiture in money could be enforced by an action of debt.

The seventh section made the same provision substantially in relation to certain other works, such as a print, cut or engraving, map, chart, or musical composition.

It is apparent from what has been stated in relation to these various sections of the law of 1831, that there was a right of action before the publication was actually made. The fourth section of the act provided that the author of a book within three months from the publication should cause to be delivered a copy of the same to the clerk of the district; but, from what has been already stated, it is clear that a right of action accrued before the deposit of this copy of the book, because the language of the sixth and seventh sections is express, that, if any other person or persons, *from and after the recording of the title of the book*, should violate any of the provisions of those sections, they were liable to an action for the benefit of the author, so that, under the Act of 1831, there can be no doubt that not only a suit in equity, but *at law*, could be maintained before the publication of the work, for the benefit of any party aggrieved.

Turning, then, to the Act of 1856, and construing it by the light thrown upon the subject by the previous Act of 1831, the question is, what rights there are under the more recent statute.

The act was declared to be supplemental to the Act of 1831, and it set forth that any copyright hereafter granted under the laws of the United States, to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print and publish the said composition, the sole right, also, to act, perform, or represent the same, or cause it to be acted, performed, or represented on any stage or public place, during the whole period for which the copyright is obtained.

It will be observed that this act speaks of a copyright being

obtained and granted, but it is clear that it does not necessarily mean that the title of the work shall be deposited with the clerk of the District Court *and publication made*, because that is not the meaning of the term in the original law, to which this is supplemental, as will be seen from what has been already said. The language of the fifth section of the Act of 1831 is, that no person shall be entitled to the benefit of this act, unless he shall give information of the copyright. That section must be construed with the other sections which immediately follow it, the sixth and seventh, and, of course, it is not intended by this language to deprive of his action a party who may be injured between the time of filing the title in the clerk's office and the time of publication. As I have already said, it in terms gives the right of action in such case. Then, this supplemental act does not necessarily mean by the term "copyright being granted," that the book has been published and notice given; otherwise the author of a book, under the Act of 1831, would have a more complete remedy than the author of a play under the supplemental Act of 1856; so that, comparing the two acts together, and construing the latter act by the light thrown upon the subject by the various provisions of the prior act I think we may arrive at a conclusion as to what is the meaning of this clause of the Act of 1856, namely, "and any manager, actor, or other person, acting, performing, or representing the said composition without or against the consent of said author or proprietor, his heirs or assigns, shall be liable for damages, to be sued for and recovered by an action on the case, or other equivalent remedy, with costs of suit, in any court of the United States; such damages, in all cases, to be rated and assessed at such sum not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court having cognisance thereof shall appear to be just;" and it is this: that the Act of 1831 having given a right of action between the time of filing the title of the book in the clerk's office, and the time of publication, the above clause in the supplemental act also gives the right of action.

It seems to me that a little reflection will convince us that that must be necessarily so, and must have been the intention of this supplemental act. It is plain that the reason why the act was passed was, because the prior law did not give sufficient protection to the author of a play. The principal profits derived from

plays are their representations on the boards of a theatre. Now, it is apparent that if that representation could be made, at any time, without the consent of the author of the work, he would be injured pecuniarily in the profits to be derived from his work, because it is from that source, principally, that the profits are expected to come. The injury, it is apparent, would be just as great, and, in most instances, it may be presumed, greater, by the representation of his play before its publication, than it would after. Take the case of the composition of a dramatic work and notice given, as the law requires, by leaving the title-page with the clerk, and after that is done, the obtaining, by clandestine or surreptitious means, of a copy of that play, and representing it upon the stage of a theatre publicly. That, of course, would be an injury, pecuniarily, to the author. The question, then, is, whether this law did not intend to protect the author against such use without his consent. I think that it did. I think when it says that any manager, actor, or other person who shall represent the composition without the consent of the author shall be liable for damages, to be sued for and recovered by an action on the case, it means as well a representation made before as after publication.

Undoubtedly the Act of 1831 contemplated a publication *after* the filing and deposit of a printed copy of the title-page of the work in the clerk's office, but it did not specify how soon that publication should be made; and, as in this case, there is evidence of the representation of "The Octoroon" and "Colleen Bawn," in various parts of the country for some time past, yet, as there is also evidence showing that for many representations made, compensation was given to the plaintiff, I am not prepared to say that, under the circumstances of this case, he has lost the right of action merely in consequence of the non-publication by him of these plays.

It is conceded that there would be a complete and perfect remedy in a court of equity, and I do not know why there should not be in a court of law. Action on the case means an action brought in a court of law. It is under the words "other equivalent remedy," that the party would have recourse to a court of equity. So that as to the main question of law there is in the case, I think that the action can be maintained.

But of course there are other questions that must be decided in

favor of the plaintiff before he can recover in this case, independent of these questions of law. As you will have seen, gentlemen of the jury, from what the court has already said, before a party is entitled to the benefits of these acts, you must be satisfied that he has brought himself within these provisions. A fundamental principle is, that he must be a citizen or a resident of the United States.

The first question for you to determine is, whether this plaintiff is within this provision of the law. He was not born in the United States, and has never been naturalized. The only question is, is he a resident, or rather, was he a resident of the United States at the time that he filed in the office of the clerk of the court of the Southern District of New York, the titles of the various plays which are in controversy here, namely: "Pauvrette," "The Octoroon," and "Colleen Bawn?" The title of the first was filed on the 2d of September 1858, the second the 12th of December 1859, and the third on the 23d of March 1860. The question is; whether at the time these acts were done by the plaintiff, he was a resident within the meaning of these Acts of Congress. That is a mixed question of law and of fact. Residence ordinarily means domicile or the continuance of a person in a place, having his home there. Of course it is not actually necessary that he should be the occupant of his own house. He may be a boarder or a lodger in the house of another. The main question in connection with this matter is as to the intention with which the man or person is staying in a particular place. In order to constitute residence it is necessary that a man should go to the place and take up his abode there with the intention of remaining; making it his home, his place of abode. If he does that, then he is a resident of that place, and we speak of this in contradistinction to the case of a person who goes to a place with the intention of remaining there temporarily, or for a short time, without any idea of taking up his abode or making his home there. This question of residence or non-residence is not to be determined by the length of time that the person may remain there. For example—a man may go into a town and take up his abode there with the intention of remaining, and, if so, he may be said to become a resident of that place, although, in point of fact, he may afterwards change his mind, and, within a short time, remove from that place, even within a few months. The question, you will see, that is to be

determined, is the state of mind, accompanied with acts, of the man at the time that he goes to the place and takes up his abode there. So a person may go to a town, and if he goes there with the intention of only remaining for a limited time and of leaving the town, although, in point of fact, he may remain there for a year or more, still it does not constitute him a resident of the town or of the place, because he does not go there and take up his abode with the intention or the purpose which existed in the other case, so that it is not to be determined by the length of time, but by the intention existing in the mind of the person, coupled with acts, which acts and intent are to indicate whether or not he is a resident of the place.

Applying these rules to the case before you, it is for you to determine whether, under the evidence, this plaintiff has brought himself within the case which I have supposed as necessary in order to constitute a man a resident of a particular place.

The plaintiff came to this country, I think the evidence showed, in 1853. He remained here, pursuing his profession as an actor and an author, until the fall of 1860 or the spring of 1861. He went to New York and took up his abode in New York city, and remained there some years. The question for you to determine is, whether, when he was here pursuing his profession, travelling about the country, from 1853 and so on up until the time that he took up what we may call his residence (without meaning by that such a residence as is spoken of in the Act of Congress) in New York, he came here and continued here and in New York, with the intention of remaining and taking up his abode as one of the people of this country. When he took a house in New York city, as it is claimed there is some evidence to show that he did, did he occupy that house with the intention of remaining in the country? If he did with the intention of remaining permanently in this country, then I think he was a resident within the meaning of the law, although he might have changed his mind afterwards and returned to England.

But you must believe from the evidence that the intention existed at the time, and that he did not at that time intend to return to England, but that his intention then was to remain here, and that this idea of returning to England afterwards arose in his mind; although there is no evidence, really, that I know of, of his actual status in England, only that he has been there since

1860 or 1861, managing a theatre. We only know that by the defendant, and perhaps from another party. We do not know what his intention is, further than may be inferred from these acts. So that, gentlemen, it is for you to determine, under the facts of the case, whether, within this description of the term residence, Mr. Bourcicault was, at the time these titles were filed in the clerk's office in the Southern District of New York, a resident of this country. If he was, then I think he was entitled to the protection of these laws. If he was not, if he was a wayfarer, a sojourner, a mere transient person, then I think that he was not entitled to their protection.

If he was a resident of the United States, then, being entitled to the protection of the law, his rights are to be determined by the law. In relation to the play of "Pauvrette," or what has been called by some of the witnesses, "The Avalanche, or Under the Snow," there does not seem to be any serious controversy. A copy of that play was deposited in the clerk's office on the 6th day of October 1858. So that as to that, if he were a resident, Mr. Bourcicault complied in all respects with the law. It is not claimed but that he did, so far as obtaining a copyright, as I understand. That has been published, by which we mean it has been printed, under the authority of Mr. Bourcicault himself, and the only question would be, whether the conduct of Mr. Bourcicault has been such, in relation to this play, as to deprive him of the protection of the Act of 1856.

As I have already said, he had the right under that act, and the sole right, to print and publish that play. He had also the sole right to act and perform it, or to cause it to be acted, performed, or represented on any stage or public place, and no person could do either one or the other without his consent. The only question, then, in relation to this, is, whether he was a resident, or has consented to the representation of this play of "Pauvrette," or "Avalanche, or Under the Snow," by the defendant. If you are satisfied that he has consented to it, then the defendant would not be liable for the performance of that play.

In relation to this, as in relation to the other plays, you must, of course, be satisfied that the plays performed were the identical plays of which Mr. Bourcicault was the author. It is not necessary that it should be identical word for word, but the idea is that another has not the right to use the work of Mr. Bourci-

cault's brain in the construction of a play, without his consent, and the mere alteration of a portion of the language of the play would not deprive Mr. Bourcicault of his protection under the law, provided there was a use of the play in all respects, substantially. I think that there ought to be some affirmative evidence introduced on the part of the defendant, that Mr. Bourcicault, by word or deed, has consented to the performance of this play by the defendant—"Pauvrette" I mean; because it is perfectly clear that the Act of 1856 gave the right to the author not only to perform, but to publish it, and declared that no one should perform it without his consent. The mere fact that it was published did not give others the right to enact it or perform it in a theatre; it must be done with his consent or acquiescence, and there ought to be some evidence that it was so done by the defendant.

As to the other plays, the "Colleen Bawn" and the "Octoroon," there is no evidence that these plays were ever published by the plaintiff in this country, and the only question for you to determine would be, so far as this country is concerned, whether the use of the manuscripts of these plays by the defendant, was with the consent or acquiescence of the plaintiff.

There is evidence tending to show that these two plays were published, that is, printed, and that this publication was made in England. I do not think that would make any difference as to the right of the plaintiff, unless that publication was with the consent of the plaintiff. If these plays were published in England with his consent, after what took place in this country, I think that any American actor or manager would have the right to import these plays from England and use them upon his stage. The question for you to determine is, whether there is any evidence satisfying you that this publication was made with the consent and under the authority of Mr. Bourcicault; I mean the publications that were made in England. You must be satisfied from some evidence in the case that they were published with his consent, otherwise there would not be a right in an actor or manager to import them and represent them in this country. But, if they were so published with his consent, I think they would have that right, because then there is an abandonment of the rights under our laws, and he is placed simply in the position of an ordinary English dramatist, who has made publication of his play in his own country. He does not seek, in other words, to follow up the

beginning of the protection which our law gave him, but resorts to publication in England, instead of publication in this country, where, if he were a resident, he would have the right and would be protected. So that the question for you to determine is, whether he did make the publication in England, and of that I think there should be some affirmative evidence to satisfy you that such is the fact.

This substantially, with one other remark, disposes of the rights of the party under the law in relation to copyright. That law prescribes a particular penalty for the unauthorized performance of a play; in the first instance, not less than \$100, and for every subsequent performance \$50; leaving a certain discretion with the court upon that subject; "as to the court having cognisance thereof shall appear to be just." In other words, it does not necessarily follow that in all cases the precise penalty fixed to the violation of the law shall be given, but the court is to exercise a certain discretion in relation to the matter.

There is another branch of the case under which it is claimed the plaintiff is entitled to protection, and that is under what is termed the common-law right, irrespective and independent entirely of the statute, and because there has been no publication of the "Octoroon" and "Colleen Bawn" by Mr. Bourcicault, or under his authority. If that be so, then he is entitled to the property in his work, existing in manuscript, and nobody can use it without his consent, and if it is so used, every person so using it is liable to respond in damages to him for such use. You will understand that there is no question raised in this branch of the case in relation to "Pauvrette," because that was published with his consent; and, if he is not protected under the law, he is not protected at all, because, having published it himself, he has given it to the public, and the only shield he has is the law. But if he has not published the other two, then he is protected at the common law in the property of his manuscripts.

It is admitted on the part of the plaintiff that if a play is performed upon a public theatre, and there is a representation of the same from the mere fact of hearing the play performed, that does not constitute a violation of the law. How far that may be true, it is not necessary for me to decide, because the evidence seems to show that these plays were performed some times, at any rate, by means of manuscripts. It is, then, necessary that it should be

shown to your satisfaction that these were used with the consent or acquiescence of the plaintiff.

The question for you to determine on this branch of the case is, whether he has ever published these works, and if he has not, whether the defendant has used them, obtaining them surreptitiously or from any person without his consent. He would have a right to perform his own plays, to authorize their performance, or he would have the right to dispose of his property, either in whole or in part, to any one that he chose. The question for you to determine is, if he has not published these works, if he has so disposed of them or acquiesced in the performance of these works by the defendant. I admit, also, that, conceding that he has not published them, he may also act in relation to them, as to, perhaps, deprive himself of the right of calling upon a person to respond in damages for the representation; that is to say, if he has allowed these plays to be represented throughout the community for a long space of time, without license and without objection, knowing the fact to be so, then I think he may be considered to have abandoned the use of them to the public.

But it must be apparent that it has been done with his knowledge and without objection on his part. That is to say, the facts must exist to indicate that he consented or acquiesced in their performance. Otherwise he is not prevented from claiming his property in these plays. I mean, of course, his property at common law, as has been explained to you.

But you will see that under this branch of the case, there is no limit as in the statute, to the amount of damages; but it simply then comes, if you believe that the defendant is responsible in damages for the representation of these plays, to the question as to the damages which the plaintiff has actually sustained by the use of the plays by the defendant. That is a question of proof, to be determined by the evidence in the case, and in relation to which you are to form your own conclusions. These plays were performed, it appears, "Colleen Bawn" and the "Octoroon," sixteen times—eight times each—by the defendant in his theatre.

It is for you to say, putting the case upon the ground of common-law right, if the plaintiff has been damaged, and to what extent he has been damaged by these representations by the defendant of these plays. As I have already said, there is no question in this branch of the case in relation to "Pauvrette,"

because that was published and his rights there stand upon the statute.

The jury found a verdict for the plaintiff, of \$900.

Supreme Court of Vermont.

OAKES AND WIFE v. SPAULDING AND OAKES.

The owner is liable for injury done by an animal which is known to be fierce or dangerous, though it does not belong to a class *feræ naturæ*.

Where such an animal is the joint property of two persons, one of whom allows the other to have charge of it, both are liable to a person injured.

THIS action was brought to recover damages for an injury to Mrs. Oakes, done by a ram that was jointly owned by the defendants, both of whom had been for a considerable time "aware that the ram had an unusual propensity to butt, and had on several previous occasions attacked and butted persons."

It appeared, without dispute, that the plaintiff, Effigene Oakes, who is the wife of the other plaintiff, while engaged by direction of her husband in driving his cows from the pasture of the defendant Oakes, was, without fault on her part, violently attacked by a ram, and seriously injured.

The testimony on the part of Spaulding tended to show that about two weeks previous to the injury to Mrs. Oakes, the sheep of the two defendants were washed together; and the defendant Oakes, of his own accord on that occasion, and without permission of or consultation with Spaulding, and in his absence, took the ram and put him into the pasture aforesaid (Spaulding having no interest in or control over it), where it remained until the time of the injury to Mrs. Oakes, taking no measures to prevent the ram doing damage—defendant Spaulding, during all that time, being wholly ignorant of the place at, or manner in, which the ram was kept, giving no directions as to his being restrained from doing damage, nor being consulted in respect to the keeping, care, or management of the ram; and not knowing that the plaintiff's cows were being kept on any land belonging to William E. Oakes,—but soon after Oakes so took the ram, Spaulding was informed of it, and made no objections and gave no directions.

The defendant Oakes made no defence, Spaulding only defending.

French and Edmunds, for plaintiffs.

Hard and Shaw, for defendants.

The opinion of the court was delivered by

BARRETT, J.—Without bringing into consideration other elements of the case at this stage of the discussion, it seems proper, in the first place, to determine what duty and liability the law imposes on the owner of such beast who has knowledge of such propensity and habit in it. And we think the true view is well stated in the opinions, taken together, of Barons PLATT and ALDERSON, in the case of *Jackson and Wife v. Smithson*, 15 M. & W. Ex. R. 561. PLATT, B., said, “No doubt a man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible.” Applying this principle in that case, in which such a ram was the subject, ALDERSON, B., said, “In truth there is no distinction between the case of an animal which breaks through the tameness of his nature and is fierce, and known by the owner to be so, and one which is *feræ naturæ*.” In the case of *Brown v. Carpenter*, 26 Vt. Rep. 638, a ferocious dog was the subject. C. J. REDFIELD said, “His being in the presence of his keeper affords no safe assurance that his known propensities will not prevail over the restraints of authority. That is the case often with men, and always liable to be with ferocious animals; as is said by one judge, ‘I think sufficient caution has not been used. One who keeps a savage dog is bound so to secure it, as to effectually prevent it doing mischief.’” These expressions convey what this court regard as the true idea of the law on this subject—treating the words “keeper” and “keeps” as referring to the person who is chargeable with the duty of keeping the animal under safe restraint. The origin, development, and application of the law in this respect is well shown in the arguments of counsel and notes, and the opinions of the judges, as the case is reported, in *Card v. Case*, 57 E. C. L. R. 622. *Popplewell v. Peirce* 10 Cush. 509, is to the same effect. These cases so

fully bring to notice the learning of the subject, that further special references seem not to be required.

As resting on the relation of ownership solely, unmodified by peculiar circumstances, it would be the clear duty of the owner of such animal effectually to restrain it from practising its favorite propensity upon persons who, otherwise, might accidentally, and without fault on their part, be exposed to its assaults. And no distinction can be made as to this duty between sole and joint owners. What is the duty of the *sole* is equally the duty of the *joint* owners; and what is the duty of one joint owner is equally the duty of the other as to third persons, unless the peculiar circumstances of the given case should relieve the one or the other from that duty.

This brings us to inquire whether what is shown in this case thus relieves Spaulding from that duty? In this connection let it be noted that we are not undertaking to decide questions in cases not yet in existence; and so are not deciding what, in supposed cases, might operate to relieve an owner, either sole or joint, from the duty of effectually restraining such an animal. The ram had been kept by Spaulding up to the time of sheep-washing that spring. It is to be inferred that he assented to the washing of the sheep together. It does not appear that the defendant Oakes acted in contravention of any right of Spaulding, as between themselves, as joint owners, in putting the ram into his own pasture, instead of taking it back to Spaulding's pasture. Oakes, in virtue of the joint ownership, had the same right to have the ram in his own pasture as Spaulding had to have it in his; and that right did not depend on expressed permission by the one to the other. In whichever pasture it was, the duty resting on the owner, of its effectual restraint, followed it. They sustained the relation of joint ownership voluntarily, and they thereby became charged with the correlative duty, and such duty rested on each personally. It was the incident result of the relation, that, as between themselves, either might lawfully have the custody of the property, and such custody, as to third persons, as touching the rights and duties springing from ownership, was the custody of both. It enured to the benefit of both with reference to rights of property; it charged both with commensurate duties in reference to it as property. Now it is noticeable that the case does not show that Oakes did anything to prevent Spaulding from having

full co-operation, either by advice, direction, or acts, in the mode of keeping the ram. All that it shows, either by statement or inference, is, that Spaulding did nothing about it after the sheep-washing—not so much as to inquire or interest himself to know where, or in what manner, his fellow-owner was keeping the ram. Being an owner of it, and knowing its propensity and habit of doing violence to persons, and being charged with the duty of effectually restraining it, and without protestation or counter-effort permitting it to be in the pasture of his co-owner, and voluntarily remaining ignorant both of the place and the manner in which it was kept, and under these circumstances it committed the alleged act of violence and severe injury, he failed utterly to fulfil the duty resting upon him, and stands as nakedly chargeable with liability for the damage done as if he alone had owned both the ram and the pasture in which the injury was done. To this view of the case the instructions of the County Court to the jury were applicable, and we think they were clearly correct.

The judgment upon the verdict for \$1500 is affirmed.

Supreme Court of Michigan.

THE PEOPLE v. ROBERT GARBUTT.

Evidence—Insanity.—In a criminal case where insanity is set up as a defence, evidence that a brother of the accused has become insane from a cause similar to that which is claimed to have operated upon the accused, is admissible as having some tendency to prove the hereditary transmission of insane tendencies.

Insanity—Burden of proof in criminal cases.—In criminal cases the burden of proof rests upon the prosecution to establish all the conditions of guilt; and it does not shift to the prisoner where insanity is set up as a defence. In cases of homicide, the jury are to weigh all the evidence, and unless reasonably satisfied, not only that the prisoner committed the act charged, but also as to his criminal capacity and intent, their duty is to acquit.

It does not follow, however, that the prosecution are required to put in evidence of sanity before the defence has introduced evidence of the contrary condition. Sanity being the normal condition of humanity, the prosecution may rest upon the presumption that it exists, until evidence to rebut that presumption has been given.

Drunkenness is no legal excuse for the commission of crime.

Good character of the defendant in a criminal case.—Evidence of the good character of a defendant is always admissible in a criminal case, and when put in, the jury have a right to give it such weight as they think it fairly entitled to. Arbi-

trary rules for this purpose cannot be laid down for their control. In some cases on unblemished good character may not only raise a doubt as against the clearest case upon the other evidence, but may even bring conviction of innocence.

Requests to charge.—Counsel cannot be absolutely precluded from having proper instructions given to the jury, by a failure to hand in written requests before the argument, as desired by the judge. A direction to that effect by the judge ought to be complied with, when practicable; but its observance must rest in professional courtesy.

ON exceptions from the Recorder's Court of *Detroit*.

The defendant was convicted in the Recorder's Court of the city of Detroit on an information charging him with the murder of one La Plante. No question was made that La Plante died of a wound from a pistol fired by defendant, but it was insisted on behalf of defendant that it was inflicted by him under circumstances of great provocation, sufficient to reduce the offence from murder to manslaughter; and it was further claimed that he was at the time mentally incompetent of a criminal intent, the reason being temporarily overthrown through the combined influence of intoxicating drinks, the great provocation, and perhaps of hereditary tendencies also.

Sylvester Larned, for the defendant.

W. L. Stoughton, Attorney-General, for the People.

The opinion of the court was delivered by

COOLEY, C. J.—[After stating the case, and disposing of some unimportant exceptions.]

The most important questions arise upon the exclusion by the recorder of evidence offered to show the insanity of a brother of the prisoner, and upon his charge to the jury and refusals to charge as requested on behalf of defendant.

Those questions which relate to the discovery and proof of insanity in criminal cases are perhaps the most difficult of any with which courts and juries are compelled to deal. Mental disease is itself so various in character, so vague sometimes in its manifestations, and so deceptive, especially in its early stages, and its causes are so subtle and so difficult to trace, that the most experienced medical men are sometimes obliged to confess that however careful and thorough their investigations, they still prove unsatisfactory, leaving the mind not only in a condition of painful uncertainty upon the principal question whether mental

disease actually exists, but when its actual presence is demonstrated, failing utterly, in many cases, to trace it to any sufficient cause. This fact is very forcibly brought home to us by the conflicting views expressed on criminal trials by careful, experienced, and conscientious medical men, who, regarding the same state of facts in the light of their scientific investigations and actual but diverse experience, are forced to express different views, in consequence of which juries, in these difficult cases, are sometimes left in a state of greater doubt and difficulty, if possible, than if no such evidence had been given. The case of *Freeman v. People*, 4 Denio 9, and the more recent and noted case of the forger Huntingdon, are conspicuous instances in illustration of this truth, but others will readily occur to the mind.

The defence sought to show hereditary tendency to insanity on the part of the defendant. That insane tendencies are transmitted from parent to child, there is no longer a doubt; and though it was once ruled that proof that other members of the same family have decidedly been insane is not admissible, either in civil or criminal cases (*McAdam v. Walker*, 1 Dow. P. C. 148, 174; Chitty's Med. Juris. 354-5), yet this ruling has since been rejected as unphilosophical and unsound, and it is now allowed to prove the insanity of either parent, or even of a more remote ancestor, since it is well established that insanity sometimes disappears in one generation and reappears in the next: Taylor's Med. Juris. 628-9, and cases cited; Whart. & Stillé's Med. Juris. 85, *et seq.*

In the case at bar it was not claimed that either parent, or any other ancestor, had been insane, but the defence offered to show that insanity had been developed in a brother arising from a cause similar to that which, it was alleged, had induced the destructive act of the defendant; and this fact was sought to be placed before the jury as throwing some light on the defendant's conduct and accountability.

Although this evidence could not be very satisfactory in character, we think it was legally admissible. It is now generally believed that other things besides actual mental disease in the parents may cause the transmission of taints to their offspring, which result in some cases in idiocy or insanity. The children of habitual drunkards are thought to be much more susceptible to mental disease than those of persons whose habits have been cor-

rect and regular, and the medical opinion has been expressed that the children of those who are married late in life are also more subject to insanity than those born under other circumstances: Taylor's Med. Juris. 629. But it sometimes occurs that persons in vigorous health and correct habits, who have nevertheless entered into a marriage which violates some physiological law, may become parents of weak and diseased children only, so that insanity enters the family for the first time in the person of the children, but through qualities derived exclusively from the parentage. Melancholy examples of this fact are presented sometimes in the case of the intermarriage of near relatives. The reasons for this are not fully understood, and cannot be explained. We can only say of such cases, that observation teaches us the existence of a law of nature which cannot be broken with impunity, but the full boundaries, extent, and force of which we are as yet unable to fully comprehend, point out, or explain. But there are other cases where we may be able to discover effects without the ability to point out either the law or the causes which produce them. What peculiar combination of qualities in parents may tend to produce mental perversion, weakness, or disease in children, must for ever remain, in many cases, matter of profound mystery. If a family of several children should be found, without known cause, to be idiotic, or subject to mental delusions, the inference of hereditary transmission would in many cases be entirely conclusive, notwithstanding the inability to point out anything of similar character in any ancestor. Insanity in a part of the children only would be less conclusive; but the admissibility of the evidence in these cases cannot depend upon its quantity, and it could never be required that it should amount to demonstration. In some cases its force must be small; in others it will prove hereditary taint with great directness. We think evidence of mental unsoundness on the part of a brother or sister of the person whose competency is in question, is admissible, and that the jury should be allowed to consider it in connection with all the other evidence bearing upon that subject.

The counsel for the defendant requested the court to charge the jury that if they believed the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the offence, the defendant must be acquitted. A doctrine like this would be a most alarming one to

admit in the criminal jurisprudence of the country, and we think the recorder was right in rejecting it. A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real it so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognised it as an excuse for crime: *Commonwealth v. Hawkins*, 2 Gray 463; *United States v. Drew*, 5 Mason 28; *People v. Hammill*, 2 Parker 223; *Pirtle v. State*, 9 Humph. 663. Whether all the charges given by the recorder on this subject were correct, we do not feel called upon to consider; as the only exception to the charge as given was a general one to the whole charge, which is not sufficient, when a part of it is correct, to raise questions upon other parts.

The defendant's counsel also requested the court to charge the jury that sanity is a necessary element in the commission of crime, and must be proved by the prosecution as a part of their case whenever the defence is insanity. Also, that where the defence makes proof of insanity, partial or otherwise, whenever it shall be made to appear from the evidence that prior to or at the time of the offence charged, the prisoner was not of sound mind, but was afflicted with insanity, and such affliction was the efficient cause of the act, he ought to be acquitted by the jury. These requests were refused.

It is not to be denied that the law applicable to cases of homicide where insanity is set up as a defence, is left in a great deal of confusion upon the authorities; but this, we conceive, springs mainly from the fact that courts have sometimes treated the defence of insanity as if it were in the nature of a special plea, by which the defendant confessed the act charged, and undertook to avoid the consequences by showing a substantive defence, which he was bound to make out by clear proof. The burden of proof is held by such authorities to shift from the prosecution to the defendant when the alleged insanity comes in question; and while the defendant is to be acquitted unless the act of killing is established beyond reasonable doubt, yet when that fact is once made out, he is to be found guilty of the criminal intent, unless by his evidence he establishes with the like clearness, or at least by a

preponderance of testimony, that he was incapable of criminal intent at the time the act was done : *Regina v. Taylor*, 4 Cox C. C. 155 ; *Regina v. Stokes*, 3 C. & K. 188 ; *State v. Brinyea*, 5 Ala. 241 ; *State v. Spencer*, 1 Zab. 202 ; *State v. Stark*, 1 Strob. 479. These cases overlook or disregard an important and necessary ingredient in the crime of murder, and they strip the defendant of that presumption of innocence which the humanity of the law casts over him, and which attends him from the initiation of the proceedings until the verdict is rendered. Thus, in *Regina v. Taylor*, *supra*, it is said : " In cases of insanity, there is one cardinal rule, never to be departed from, viz. : that the burden of proving innocence rests on the party accused." And in *State v. Spencer*, *supra*, the rule is laid down thus : " Where it is admitted or clearly proved that the prisoner committed the act, but it is insisted that he was insane, and the evidence leaves the question of insanity in doubt, the jury ought to find against him. The proof of insanity at the time of committing the act ought to be clear and satisfactory, in order to acquit a prisoner on the ground of insanity, as proof of committing the act ought to be in order to find a sane man guilty." These cases are not ambiguous, and, if sound, they more than justify the recorder in his charge in the case before us.

The defendant was on trial for murder. Murder is said to be committed when a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied : 3 Coke Inst. 47 ; 4 Bl. Com. 195 ; 2 Chit. Cr. I. 724. These are the ingredients of the offence ; the unlawful killing, by a person of sound mind and with malice, or to state them more concisely, the killing with criminal intent ; for there can be no criminal intent when the mental condition of the party accused is such that he is incapable of forming one.

These, then, are the facts which are to be established by the prosecution in every case where murder is alleged. The killing alone does not in any case completely prove the offence, unless it was accompanied with such circumstances that malice in law or in fact is fairly to be implied. The prosecution takes upon itself the burden of establishing not only the killing, but also the malicious intent in every case. There is no such thing in the law as a separation of the ingredients of the offence, so as to leave a

part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent.

It does not follow, however, that the prosecution at the outset must give direct proof of an actual malicious intent on the part of the defendant; or enter upon the question of sanity before the defence have controverted it. The most conclusive proof of malice will usually spring from the circumstances attending the killing, and the prosecution could not well be required in such cases to go further than to put those circumstances in evidence. And on the subject of sanity, that condition being the normal state of humanity, the prosecution are at liberty to rest upon the presumption that the accused was sane, until that presumption is overcome by the defendant's evidence. The presumption establishes, *prima facie*, this portion of the case on the part of the government. It stands in the place of the testimony of witnesses, liable to be overcome in the same way. Nevertheless it is a part of the case for the government; the fact which it supports must necessarily be established before any conviction can be had; and when the jury come to consider the whole case upon the evidence delivered to them, they must do so upon the basis that on each and every portion of it they are to be reasonably satisfied before they are at liberty to find the defendant guilty.

This question of the burden of proof as to criminal intent was considered by this court in the case of *Maher v. The People*, 10 Mich. 212, and a rule was there laid down which is entirely satisfactory to us, and which we have no disposition to qualify in any manner. Applying that rule to the present case, we think the recorder did not err in refusing to charge that proof of sanity must be given by the prosecution as a part of their case. They are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defence. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh, and pass upon it with the understanding that although the initiative in presenting the evidence is

taken by the defence, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt. Upon this point the case of *People v. McCann*, 16 N. Y. 58, is clear and satisfactory, and the cases of *Commonwealth v. Kimball*, 24 Pick. 373; *Commonwealth v. Dana*, 2 Met. 340; *State v. Master*, 2 Ala. 43; *Commonwealth v. McKee*, 1 Gray 61; *Commonwealth v. Rogers*, Id. 500; and *Hopps v. People*, 31 Ill. 385, may be referred to in further illustration of the principle. See also *Doty v. State*, 7 Blackf. 427. The recent case of *Walter v. People*, 32 N. Y. 147, does not overrule the case of *People v. McCann*, but so far as it goes, is entirely in harmony with the views here expressed.

The only remaining error alleged relates to the refusal of the recorder to charge as requested upon the evidence adduced by the defendant to establish his uniform good character previous to the time of the alleged offence. To understand this refusal it must be known that the counsel for the defendant had previously been informed by the court that any requests to charge the jury should be handed in before he commenced his argument to the jury. In compliance with this direction, seven written requests were handed in, which were appropriately responded to. None of these related to good character. The court, however, in the charge alluded to the proof of good character, coupling it with a caution to the jury not to give too much weight to the statement the prisoner had made in the case, and which must be considered as made under strong temptations to state that which was untrue in his own exculpation. After this charge was given, the court was asked to instruct the jury that they had a right to believe the defendant's statement in opposition to sworn evidence; and this charge was given, with a repetition of the caution above stated. The court was then further requested to charge that, as to good reputation, it is for the jury to consider whether such reputation tends to rebut the presumption of malice. The court refused to give the charge, on the ground that it might mislead the jury without further explanation, which the court did not feel bound then to give.

We infer from the bill of exceptions that the recorder declined to give what he regarded as proper instructions on this point because the request was not handed in at a prior stage of the case. As a legal proposition, however, the refusal could hardly be jus-

tified on this ground. It is undoubtedly proper that requests to charge should be handed in by counsel before they go to the jury upon the facts; and a rule by the court to this effect ought to be regarded as binding by counsel. Fairness to the judge, and common courtesy, would require that such a rule be complied with, that he may have opportunity to carefully weigh his instructions, and to reduce them to writing if he shall so desire. Counsel who should decline to obey so reasonable a request might justly be regarded as wanting in that courtesy which distinguishes the members of the profession generally in their intercourse with each other, and which is especially due from the bar to the judges who endeavor patiently to administer the law with impartiality amid all the difficulties and embarrassments that sometimes surround the trials by jury. Nevertheless the rule cannot be laid down as an unbending rule of law. The necessity for a request to charge will sometimes arise from what has already been charged by the judge. It may become important in order to render more clear and explicit that which he has already stated, but which has fallen short of a complete exposition of the law upon the point to which his remarks have been addressed. And if in any case the counsel should fail to request the court to lay down those familiar rules of law which it is always to be expected will be given in the cases in which they were applicable—such as the necessity of malice in murder, or a breaking in burglary—the defence could not justly be precluded by such omission from having the proper instructions given.

It is quite possible that in the present case counsel took it for granted that the proper instructions would be given on the subject of the proof of character without any request to that effect. With many judges it is a matter of course to give such instructions, and it is to be presumed the recorder would have done so in the present case had it occurred to him as important. But we think the request of counsel did not come too late in this instance, and he was entitled to have the proper instructions given.

We also think the instructions requested were correct in substance, and that the defendant was entitled to them without explanation or qualification. The whole request was that the jury be instructed that they had a right to consider whether the evidence of good character tended to rebut the presumption of malice. That the evidence was admissible in the case was un-

questionable ; but it was equally unquestionable that it could have no bearing whatever except upon the question of malicious intent. To refuse the instruction, therefore, seems to us equivalent to holding, or at least to leaving the jury to infer, that the evidence which was lawfully put into the case was immaterial after it was in.

The instruction is often given in these cases that proof of good character is not to be allowed to weigh against evidence which in itself is satisfactory, and Mr. Starkie has said, "it ought never to have *any* weight except in a doubtful case : " 1 Stark. Ev. 75. Such instructions are well calculated to mislead. Good character is an important fact with every man, and never more so than when he is put on trial charged with an offence which is rendered improbable in the last degree by an uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skilful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of guilt which would not otherwise exist, but may bring conviction of innocence. In every criminal case it is a fact which the defendant is at liberty to put in evidence ; and, being in, the jury have a right to give it such weight as they think it entitled to. Chief Justice SHAW has pointed out in the *Webster Case* how important it is in the case of some minor offences, and he adds that, "even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like this of murder, to prove a high character, and by strong evidence to make it counterbalance a strong amount of proof on the part of the prosecution : " *Commonwealth v. Webster*, 5 Cush. 295. In some cases it may have even this great effect.

The difficulty at this point lies in attempting to surround the jury with arbitrary rules as to the weight they shall allow to evidence which has properly been placed before them. This court has several times found it necessary to declare that no such arbitrary rules are admissible. We refer particularly to the cases of

People v. Jenners, 5 Mich. 305; *Maher v. People*, 10 Id. 212; and *Durant v. People*, 13 Id. 351. The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts and weigh the evidence. The law has established this tribunal because it is believed that from its members, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common-sense view of a set of circumstances involving both act and intent, than any single-man, however pure and eminent he may be. This is the theory of the law, and as applied to criminal accusations it is eminently wise and favorable alike to liberty and to justice. But to give it full effect the jury must be left to weigh the evidence and to examine the alleged motives by their own tests. They cannot properly be furnished for the purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when they cannot conscientiously say they believe such an intent to exist.

Upon a full consideration of this case, we are compelled to say we find some errors in the record, for which the conviction should be set aside, and a new trial awarded.

Supreme Court of Wisconsin.

NATHANIEL W. DEAN, APPELLANT, v. WILLIAM CHARLTON,
TREASURER, &C., AND OTHERS, RESPONDENTS.¹

Where a city charter required that all work should be let by contract to the lowest bidder, *held*, that the city authorities could not contract at all for laying the Nicholson pavement, the right to lay it being a patented right and owned by a single firm, and, therefore, the work being one which could not be open to competition.

PAINE, J.—This was a bill in equity to enjoin the sale of the plaintiff's lands for an assessment imposed upon them for paving the streets in front of them with what is known as the Nicholson pavement. It is claimed that the proceedings failed in several

¹ We are indebted for the opinion in this case to the Hon. O. M. CONOVER, Reporter for the State of Wisconsin.—EDS. AM. LAW REG.

respects to comply with the provisions of the charter, in matters so essential as to render the tax void. But another objection is taken, which goes to the foundation of the whole proceeding; and the conclusion to which a majority of the court have come upon that, will preclude the necessity of examining any of the other questions. This objection is based upon the provisions of the charter requiring all work to be let by contract to the lowest bidder, and the fact that the right to lay the Nicholson pavement is a patented right, and was owned for the state of Wisconsin by one firm in the city of Milwaukee. It is said that the charter authorizes a contract only for such work as is open to competition, and that this work was not open to competition, because nobody had any legal right to do it except the one firm that owned the patent. Upon these facts alone the objection seems to me unanswerable. And nothing seems to be necessary, beyond the simple statement of the requirement of the charter as to the mode of letting work, and the fact that this right was a monopoly, to show that the charter is inapplicable to it, and that a contract for this work would be in violation of the necessary implication from its provisions.

Indeed the counsel for the respondent, by their course of argument, seemed tacitly to admit that there was an apparent incongruity in applying the provisions of the charter to a contract for such work as this. And they sought to avoid it in two modes. First, they claimed that if it was clear that the charter could not be applied in such a case; that it would be a mere farce to advertise to let to the lowest bidder work which only one firm had any legal right to do, so that the very object of the charter—to procure the work to be done as cheaply as possible—might be defeated thereby; then it must be assumed that the legislature did not intend the mode provided in the charter to be applicable, and that the work might be contracted for without regard to that mode.

The other mode of avoiding the objection was by proving that the owners of the patent were anxious and willing to sell the royalty, and had offered it for sixteen cents per square yard. And upon this proof it is insisted that the principle of competition was preserved, and the requirements of the charter complied with. I will state, as briefly as may be, why I think neither of these theories overcomes the objection. The first assumes the correctness of the position that the charter cannot be applied to a con-

tract for work the right to do which is a patented monopoly. And it then infers that because the charter is inapplicable, the city had the general power to make the contract, without regard to its restrictions, and that such was the legislative intent. The error lies in this inference. This position was attempted to be supported mainly by the case of *The Harlem Gas Co. v. The Mayor, &c.*, 33 N. Y. 309. The counsel on both sides rely upon that case, and it will therefore be proper to examine it carefully to see what position it sustains.

The action was on a contract for lighting certain streets in New York city with gas. The company had by law the exclusive right to furnish gas for that part of the city. The charter required all contracts for work and supplies, beyond a certain limitation in value which this contract far exceeded, to be let by contract to the lowest bidder. The contract for this gas was not so let, and therefore it was claimed to be void. The court held that, inasmuch as the company had the exclusive right to furnish the gas, the provision of the charter requiring the contract to be let to the lowest bidder was inapplicable, and that it would be absurd to attempt to apply the provision in such a case. PORTER, J., says: "In the present case, an adoption of the construction claimed by the municipal authorities would lead to the absurd conclusion that the legislature designed to force a provision into the city charter compelling the corporation to pay whatever price the sole bidder might choose to exact in his sealed proposals for the use of property in which he has an absolute monopoly, and in relation to which there can be no competition within the range of legal possibility." BROWN, J., says: "Had the common council, in place of this condition, invited proposals in the usual form, there could have been but a single offer at best, and the provisions of the statute would have failed of effect, because they were not applicable to such a subject."

The case therefore fully sustains the position of the appellant's counsel, which seems obvious enough in itself, that a provision requiring work to be let to the lowest bidder, is not applicable to a contract for work as to which there can be no competition. And if not applicable to it, of course it can furnish no authority for such contract. And if such a contract is made, it must be sustained, if at all, by authority derived from some other source than such a provision of the charter.

But the court in that case did hold the contract valid, and the city liable, and this branch of the decision the respondent's counsel rely upon to sustain their position, that if the charter was inapplicable, these proceedings should be sustained, whether conducted in accordance with it or not. But the cases are so different in respect to the grounds of that part of the decision, that it becomes inapplicable here. The power to contract for the lighting of the streets of the city was assumed in that case to be one of the general powers of a municipal corporation. Hence, so soon as the court came to the conclusion that the mode of contracting pointed out in the charter was inapplicable in such a case as they had under consideration, they had no difficulty in sustaining the contract under the general corporate power of the city. But here the question is quite different. It is not necessary to inquire whether the city of Madison, by virtue of its existence as a municipal corporation, would have had the power to contract for paving its streets with the Nicholson pavement, at the expense of the city, after discovering that the provisions of the charter enabling it to cause its streets to be paved at the expense of the lots, were inapplicable for that purpose. If it had such power, and had made such a contract binding the city at large, the question would then have been like that decided by the New York court. But here it made no such attempt. It seeks here to charge the expense upon the lots, and this it has no general power to do by virtue of its mere existence as a municipal corporation; but, if done at all, it can only be done under the statutory authority in its charter, and by complying substantially, if not strictly, with all its requirements. So soon, therefore, as we arrive at the conclusion that these requirements are inapplicable and inadequate to a contract for a work, the right to do which is an exclusive monopoly, it ends the question; for there is no general power of the city to fall back upon. I think, therefore, that while the case in New York does show that the contract in this case was outside of the scope of the provisions of the charter, it fails to show any general authority in the city by which it could be sustained, independent of those provisions. In truth, it would seem too late for us now to say that these requirements of the charter are not applicable to contracts for paving streets, for the contrary has uniformly been held by this and other courts: *Myrick v. La Crosse*, 17 Wis. 442; *Mitchell v. Milwaukee*, 18

Id. 92; *Kneeland v. Furlong*, 20 Id. 437; *Brady v. New York*, 20 N. Y. 312.

Neither can I see that the other mode of answering the objection is successful. On proof that the owners of the patent were willing to sell the "royalty," as it is called, for sixteen cents per yard, it is said that other parties might have bid, and the principle of competition was preserved. If an arrangement had previously been made, by which the owners of the patent became bound to transfer the right at sixteen cents per yard, and the contracts had been let in pursuance of the charter, for the materials and labor, subject to the condition of obtaining the patent, the principle of competition, so far as the labor and material were concerned, might have been preserved. But even in that case there could have been no competition as to the price of the royalty. So far as that constituted a part of the cost, there was no possibility of introducing this principle at all. But if the method suggested had been resorted to, so as to preserve competition in the labor and materials, perhaps the fact that it could not be preserved as to the comparatively small balance of the expense, would not have avoided the whole. It is unnecessary to determine whether so strict an application of the spirit of the charter would have been required.

But no such method was resorted to. On the contrary, the proposals were for furnishing the materials and doing the work, without anything in regard to the price of the royalty, and without any previous agreement with the owners of it. There could be no competition in this method. The fact that the owners were willing to sell it at sixteen cents per yard, does not show that there could have been. For, assuming that any contractor might have safely relied on the willingness of the owners to sell it at that price,—assuming that the latter, in case they desired to bid for the work themselves, would not use their power over the patent to aid in obtaining the contract, as far as possible, by preventing others from getting it,—assumptions which it would scarcely be safe for contractors to act upon,—still, there could have been no safety in bidding. For, suppose A., B., and C. all bid, none of them making any previous arrangement for the purchase of the royalty. Before the bids are opened, one of them thinking, to get the contract, desiring in good faith to do the work, goes to the owner of the patent and buys the royalty, for that part of the

city where the work is ordered to be done. The bids are opened, and some one else has the lowest bid, and gets the contract. What position would the successful bidder be in, bound under somewhat severe penalties to enter into and complete his contract, and yet with a rival and disappointed bidder having the sole legal right to do the work? Certainly, this shows that no contractor could safely bid, and bind himself in the manner here required, with sureties and stipulated damages for a failure, without in the first place procuring the right from the owners. For, although they might be willing to sell, that very willingness would make it unsafe for him; because some other bidder might step in and secure the right, in anticipation of the opening of the bids. But if any contractor should, before bidding, purchase the right, then nobody except him could safely bid. It seems clear, therefore, that proof merely of the willingness of the owners to sell the right at a fixed price, does not preserve competition. And the result in this instance, if not conclusive, is yet very satisfactory proof of it. There was no bid except that of the owners of the patent.

It has been compared to the case of work ordered to be done with a particular kind of stone, the quarry of which is owned by one who is willing to sell to all alike at a fixed price. Undoubtedly in that case there might be free competition. If the owner of the quarry, before the contract was let, should sell to one bidder enough stone for the work, he might the next day sell as much to another bidder. And if neither of these should get it, he might afterwards sell whatever was needed to such person as did get the contract. Such being the case, any bidder could safely wait until he obtained the contract before making arrangements for his stone. But there is a marked difference in the case of the patent. There the owner having disposed of the right for any particular district to one person, cannot afterwards furnish the same right to any other. This difference destroys the whole force of the illustration, and shows that the safety of bidders would be very different in the two cases.

It seems to me, therefore, a conclusion derivable from the very nature of the case, that competition could not be, and was not, preserved in the letting of this contract; and that it was, therefore, beyond the scope and in violation of the spirit of the charter.

It may be said that this pavement is of a superior character, and that it is very desirable that cities should have authority to cause it to be laid. It may be so; but if so, I think the aid of the legislature will have to be invoked, and that there is no authority to contract for it, under charters which require the work to be let by contract to the lowest bidder.

It was suggested, that, even though this assessment should be held illegal, still there was nothing to show it to be inequitable, and, therefore, a court of equity ought not to interfere. But that principle has never been applied to these special assessments. And certainly it could not be applied where there is no legal authority to contract for the work at all, to pay for which the assessment was imposed.

The judgment must be reversed, and the cause remanded with directions to enter judgment for the plaintiff for a perpetual injunction, according to the prayer of the complaint.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.¹

SUPREME COURT OF VERMONT.²

SUPREME COURT OF THE UNITED STATES.³

ACTION.

Assignability.—A right of action for wrongfully and without permission raising ores and minerals from land situate in another state, belonging to another person, and selling and converting them, is assignable, and may be prosecuted in the courts of this state, by one to whom the owner has assigned such ores and minerals and all claim for their wrongful conversion: *Hoy v. Smith et al.*, 49 Barb.

AGREEMENT.

Complaint on.—Although a complaint sets out an express agreement, it will be sustained by evidence of an implied: *Smith v. Lippincott et al.*, 49 Barb.

¹ From Hon. O. L. Barbour; to appear in Vol. 49 of his Reports.

² From W. G. Veazie, Esq., Reporter; to appear in 40 Vt. Rep.

³ From J. W. Wallace, Esq., Reporter; to appear in Vol. 6 of his Reports.

Evidence.—An implied agreement to pay for materials, &c., when not inconsistent with an existing written agreement between the parties, is admissible in evidence, and will sustain an action to recover the value of such materials: *Id*.

AGENT.

Insurance—Ratification.—Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium-note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus: "The insurance on this application to take effect when approved by E. P. D., general agent," &c., does not make the previous transaction a nullity until approved: *Ins. Co. v. Webster*, 6 Wall.

Hence, though the general agent sent back the application, directing the agent who had delivered the policy to return to the party insured his premium-note, and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor cancelled the policy: *Id*.

ATTORNEY AND CLIENT.

Authority of Counsel—Equity Practice.—An attorney at law having no power *virtute officii* to purchase for his client at judicial sale land sold under a mortgage held by the client, the burden of proving that he had other authority rests on him: *Savery v. Sypher*, 6 Wall.

On an application to a court of equity to refuse confirmation of a master's sale and to order a resale—a case where speedy relief may be necessary—the court may properly hear the application, and act on *ex parte* affidavits on both sides, and without waiting to have testimony taken with cross-examination: *Id*.

AWARD.

Of Referee—Revision by Supreme Court.—It is well settled that the Supreme Court will not revise the proceedings of a referee unless it appears upon the face of the report that the referee, in deciding the questions raised before him, intended to decide them according to law, and that in making his decision he has clearly mistaken the law: *Smith v. Sprague*, 40 Vt.

It is not error for the County Court to allow the referee to amend his report by making a statement of the facts in full that appeared before him on the hearing: *Id*.

BASTARDY.

Pauper—Interest.—A town has only the same right to money received through its overseer in settlement of a prosecution for bastardy that it would have if it were paid under an order of affiliation: *Drake v. Town of Sharon*, 40 Vt.

This money, in either case, is to be applied, exclusive of all costs, "solely for the support of the child:" *Id*.

The order of affiliation is intended to provide for the support of the child only for such time as he is likely to be unable to support himself, and no longer. If, therefore, the mother supports the child for such time without charge to the town, she will then be entitled to the money received in settlement by the overseer, with interest, the town having applied the money to its own use from the time it was paid into its treasury: *Id.*

The town is trustee of money so received for the specific purpose of applying it to the support of the child and the benefit of the mother: *Id.*

BROKERS.

Right to sell Stock.—Where a person employs brokers to purchase stocks for him, upon an agreement that he shall keep a margin of ten per cent. upon the par value above the market rate of the shares, in the hands of the brokers, and he fails to do so, whereupon the brokers notify him of a fall in the market price of the shares, and that they require him to furnish more money, to make his margin good, they may, upon his neglecting to comply, sell the stock, at the stock exchange, without further notice to the owner: *Markham v. Jordan*, 49 Barb.

There is, under these circumstances, a clear breach of the principal's contract, which justifies the brokers in selling; and the notice of the time and place of sale, required in the case of a sale of pledged stock, need not be given: *Id.*

CONSTITUTIONAL LAW.

Federal and State Jurisdiction—Mandamus to State Courts.—After a return unsatisfied of an execution on a judgment in the Circuit Court against a county for interest on railroad bonds, issued under a state statute in force prior to the issue of the bonds, and which made the levy of a tax to pay such interest obligatory on the county, a *mandamus* from the Circuit Court will lie against the county officers to levy a tax, even although prior to the application for the *mandamus* a state court have perpetually enjoined the same officers against making such levy; the *mandamus*, when so issued, being to be regarded as a writ necessary to the jurisdiction of the Circuit Court which had previously attached, and to enforce its judgment; and the state court therefore not being to be regarded as in prior possession of the case: *Riggs v. Johnson County*, 6 Wall.

CONTRACT.

Consideration.—If part of a consideration be merely void, the contract may be supported by the residue, if good *per se*; but if any part be illegal it vitiates the whole: *Cobb v. Cowdery*, 40 Vt.

A promise by a party to do what he is bound in law to do is an insufficient, but not an illegal, consideration: *Id.*

However strong may be one's moral obligation to do that which he agreed to do, it is only promises founded on the performance of duties imposed by law which are regarded in law as merely gratuitous and not binding: *Id.*

Services by one, not bound by law to render the services, in aiding a party in interest in the preparation for trial, by disclosing who are

informed upon material points, and what they would testify to, are sufficient consideration to support a contract: *Id.*

A parol agreement to deliver up a judgment with the execution thereon issued "to be satisfied" in consideration of the settlement of, and indemnification against, a claim which is being made by a third party, is binding, and is a complete defence to a suit on the judgment, although the promise was made to, and the consideration came from, but one of the defendants: *Id.*

COVENANT.

Damages—Warranty.—A party having been defeated in a suit against him for damages for having interfered with an easement on his land, may recover of his warrantor the damage he has sustained in consequence of the breach of the covenant against encumbrances, and such costs and expenses as he has fairly and in good faith incurred in attempting to maintain and defend his title: *Smith v. Sprague*, 40 Vt.

He was not bound to follow the advice of his warrantor by suing the party who claimed the easement and entered upon the premises: *Id.*

DEED.

Construction.—Where the purpose of the grant is clearly ascertained from the premises of the deed, this will prevail in the construction, and repugnant words will be rejected though they stand first in the grant: *Flagg, Administrator of Tyler, v. Eames*, 40 Vt.

And where the premises contain proper words of limitation, and the *habendum* is repugnant to the grant, the *habendum* yields to the manifest intent and terms of the grant: *Id.*

A deed conveyed in its granting part to the plaintiff's intestate "and her heirs and assigns for ever, a certain piece or parcel of land situated, lying, and being in Halifax, and is the same farm on which I" (the grantor) "now live; that is to say, one undivided half of the same, with the buildings thereon, with the privileges and appurtenances thereto belonging, bounded," &c. (describing the boundaries); "always provided that, in the event of her decease, the same shall revert to me if living, if not, to my heirs—being the same farm which I purchased of Darius Plumb;"—*habendum* to the plaintiff's intestate "and her heirs and assigns, to her and their own proper use, benefit, and behoof for ever," with the usual covenants of seisin, warranty, and against encumbrances, and the following clause thereto annexed, viz.:—"Always reserving the reversion to myself and heirs as stipulated in the deed:"

Held, that the plain intent of the deed was to convey an estate for life, and not an estate in fee, and that the deed must have effect according to its intent: *Id.*

Delivery.—Where the grantor in a deed hands the same to another with instructions to deliver it, as his agent, presently to the grantee, the delivery not depending on any condition, as between the parties to the deed, the title passes at the time of the delivery to the agent: *Ernst v. Reed*, 49 Barb.

ESTOPPEL.

Disclaimer of Property.—A party having disclaimed the ownership of property to an administrator, and the latter relying on such disclaimer

having proceeded to inventory and have the property appraised, and the appraisal duly returned and recorded, will not by these acts alone be estopped from asserting his ownership of it: *Turner v. Waldo*, 40 Vt.

FRAUD.

Purchase by an Insolvent.—B., a merchant at S., in former good standing with the plaintiffs' firm in New York, gave the latter a verbal order for a bill of goods on credit, which were sent to him by railroad and left in a storehouse at S. B. was, in fact, insolvent, and became fully aware of it before he paid the freight and took the goods. *Held*, that the judge properly instructed the jury that it would be a fraud upon the plaintiffs, sufficient to avoid the sale, if they believed upon the evidence, that B. received the goods with a preconceived design not to pay for them, although he had no such design when he gave the order: *Pike et al. v. Wieting et al.*, 49 Barb.

HIGHWAY.

Pent Roads.—All pent roads are *public* highways, though called in the early statutes "private roads,"—that is to say, they may be used by all,—but they are not *open* highways: *Wolcott v. Whitcomb*, 40 Vt.

In the absence of any prescribed regulations by the proper authority, in respect to gates and bars across a pent road, the owner of the land through which the road is laid may erect gates and bars for the protection of his field and crops, if they do not interfere with the reasonable use of the road as a pent road: *Id.*

INSURANCE.

Marine.—Where temporary repairs are made upon a vessel, in a foreign port, by the insured, for the sole benefit of the insurers, and by their express consent and authority, to enable the vessel to be navigated to the port of destination, for the purpose of there making permanent repairs at less cost, the insurers must bear the whole expense of the temporary as well as the permanent repairs, although the amount, in the aggregate, exceeds the sum named in the policy: *Alexandre et al. v. The Sun Mutual Ins. Co.*, 49 Barb.

LANDLORD AND TENANT.

Right of Landlord to maintain Possession.—Where the landlord and owner of premises in fee, claiming that the term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands and attempt to dislodge the former by force. The landlord being in the actual possession, has a right to maintain it, and to use force, if necessary, for that purpose: *Sage v. Harpending*, 49 Barb.

Lease—Liability of Assignee for Rent.—A lease taken by A. in trust for a corporation thereafter to be formed, creates, on the formation of such corporation, and upon its receiving an assignment of such lease, with knowledge of the terms upon which it was executed, and received from the lessor by A., a liability, in equity, on the part of such corporation, to pay the rent to the lessor; and such liability cannot be avoided

by a transfer of the lease by the corporation to B.: *Van Schick v. The Third Avenue Railroad Co.*, 49 Barb.

OFFICE.

Profits of Office on Quo Warranto—Measure of Damages.—Where an intruder, ousted by judgment on *quo warranto* from an office having a fixed salary—and of personal confidence as distinguished from one ministerial purely—takes a writ of error, giving a bond to prosecute the same with effect and to answer all costs and damages if he shall fail to make his plea good—thus, by the force of a *supersedeas*, remaining in office and enjoying its salaries—does not prosecute his writ with effect, and is, after his failure to do so, sued on his bond by the party who had the judgment of ouster in his favor—the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and consequent operation of the *supersedeas*: *United States v. Addison*, 6 Wall.

The rule which measures damages upon a breach of contract for wages or for freight, or for the lease of buildings, where the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and where the damages which he is entitled to recover is the difference between the amount stipulated and the amount actually received or paid, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical: *Id.*

PARTNERSHIP.

Promissory Note—Payment.—If a note is in fact a partnership debt, all the partners are under the same obligation to pay it as between themselves, if signed by one partner only, as though signed by all; and if a partner pay it with his private funds it will extinguish the note and leave it of no binding force as a note; and the paper would constitute the basis of a claim in his favor against the partnership, and such claim would be a proper subject of adjustment in the settlement of the company business: *Sprague v. Ainsworth*, 40 Vt.

But a naked promise afterwards made by the signer, to the partner who paid it, to pay the note, would not revive it as a note so as to enable said partner, or one to whom he negotiated it, to recover thereon in an action against the signer: *Id.*

SHIPS AND SHIPPING.

River Navigation—Collision—Damages—Practice.—Where the usage in navigating a river is that both ascending and descending vessels shall keep to the right of the centre of the channel—which is the usage in the river Hudson—the omission to comply, seasonably with that regulation, if the omission contributes to the collision, is a fault for which the offending vessel and her owners must be responsible: *The Vanderbilt*, 6 Wall.

Compliance with such a usage is required in all cases where the course of a vessel is such that, if continued, there would be danger of collision with other vessels navigating in the opposite direction: *Id.*

Unless precautions are seasonable, they constitute no defence against

a charge of collision, although they may be in form such as the rules of navigation require: *Id.*

Objections to the amount of damages, as reported by a commissioner and awarded by the Admiralty Court, will not be entertained in this court in a case of collision where it appears that neither party excepted to the report of the commissioner: *Id.*

Power of Master.—Where a vessel is run by the master on shares, it is not a chartering, nor does the master become owner, for the time being; and parties dealing with him are justified in considering him clothed with the usual authority of a master; especially where one of the owners indorsed the action of the master, in dealing with such parties, before they gave him credit: *McCready v. Thorne et al.*, 49 Barb.

Under such circumstances, the master can bind the vessel and her owners for supplies and necessities furnished: *Id.*

TAXATION.

School District—Vote.—A vote to sustain a school for a definite period is not equivalent to a vote to defray the expenses of that school by a tax on the grand list: *Adams v. Crowell*, 40 Vt.

The warning for an annual school meeting contained, among other things, two articles as follows, viz.: "3d. To see if the district will vote to have a school during the ensuing year, and if so, how long, and when to begin;" and "4th. To see how to support said school." The district "voted to sustain a school during four months the ensuing year, in summer and fall." *Held*, that this furnished no authority for the making of a rate bill assessing a tax upon the grand list of the district to support a school: *Id.*

The legal effect of the vote cannot be enlarged, restricted, or controlled by what the voters at the meeting intended to do, or by what they supposed that they had done: *Id.*

TROVER.

Special Plea—Lessor and Lessee owning Joint Stock.—In trover the gist of the action is the conversion. A special plea denying the conversion amounts to the general issue, and, therefore, is bad on demurrer: *Turner v. Waldo*, 40 Vt.

The administrator of a lessee who had died pending the lease, would at best have no more right to sell and dispose of stock on the farm owned jointly by the lessor and lessee, and to be divided at the expiration of the lease, than the lessee had—and if he so sell such property the lessor may recover in trover the value of his undivided interest: *Id.*

THE
AMERICAN LAW REGISTER.

AUGUST, 1868.

RAILWAY MANAGEMENT AND RESPONSIBILITY.

I. THERE is one question which courts of justice, and railway managers, sometimes adjust in opposite directions ; we mean the source from which dividends should arise. The courts of justice have settled it, as an inflexible rule, that no joint stock company can justly declare dividends except out of the net earnings of the company. And it would seem there could be no question in regard to the soundness of that rule. But it is well known, that a considerable proportion of the American railway companies have attempted to maintain the credit of their stock, by the payment of dividends out of borrowed funds. And this experiment has been tried, to a considerable extent, in England and Scotland, within the last few years ; thereby creating great clamor, and no small confusion, both in the public opinion and the state of their own accounts.

Parliament has attempted to devise schemes for railway management, inspection and supervision, whereby an adequate remedy should be applied, by the action of the shareholders themselves, through the ordinary channels of corporate action. And there can be no question that this remedy is far more natural, and less liable to bring unjust discredit upon the market value of joint stock shares, than an appeal to the courts. The very fact that the concerns of a company have become the subject of judicial

controversy tends, more or less, to depreciate the value of its shares. The inference is very natural that there must have been some degree of mismanagement, or the matter would not have been brought before the courts. Men, who desire a safe investment of their money, naturally avoid the stock of a company in regard to whose management there exists a legal controversy.

But nevertheless these things must sometimes occur. It cannot be denied for a moment, that the payment of dividends on shares by a joint stock company, by means of borrowed funds, is a clear and unquestionable abuse. It is, in fact, neither more nor less than the diversion of so much of the capital stock. All funds borrowed by such companies, are the cashing of its capital, and after the distribution of it among the shareholders, the capital is so much diminished; and if the process is sufficiently extended, the capital must of course become entirely dissipated, and the company become a mere shadow and a sham. And so soon as the process begins, the shamming, to that extent, is initiated; and it is only in degree, or proportion, whether, after one-tenth, or one-half, or the whole, of the capital stock is thus dissipated, that the company becomes, more or less, a sham and a pretence. The law can only regard that as radically and essentially vicious and inadmissible, which, carried to its final results, will annihilate the substantial corporate existence of the company, and leave it a mere shadow, with all its organs of action, and without any of its substantial means of meeting its undertakings, and enabling it, so far as it puts forth any action, to have a name to live, while, to all practical purposes, it has really thereby become dead, and well deserves the final office of sepulture, which it becomes the duty of courts to perform.

The above view is so simple and so unquestionable, that it is scarcely possible to make it more intelligible by any illustration. It may be inquired of those who make, or who attempt to justify, this species of fictitious dividends, what is the proper definition of the real purpose and intent of a dividend upon shares in the capital stock of joint stock companies? Do we thereby understand a mere payment of money by the treasurer of the company to the shareholders, in proportion to the number of shares held by each, as an indemnity for accruing interest, thus treating the purchase of shares as a substantial loan, or advance, of so much money to the company? certainly not. For this would be to set

those companies in operation upon credit merely, when in fact there existed no basis for any credit or undertaking whatever. It may be too true, and not the less scandalous than true, that too many joint stock companies are allowed to go into operation upon no more substantial basis than this. But the true theory of joint stock companies is undoubtedly something very different from this. The money paid for shares is paid unconditionally to the company, and becomes the exclusive property of the corporation, and for ever represents the shares for which it is paid, not as a fund at interest, but a fund for the purpose of transacting the legitimate business of the company, and for which the holder of the share can have no claim of surrender or return, until the company, in the regular discharge of its appropriate office, or functions, earns more money than is required in carrying forward its lawful business. Then only is there any surplus which can lawfully be divided among the shareholders, so as to constitute a dividend. And to call anything else a dividend is a mere abuse of language. And for the courts, when applied to for the purpose, to allow any other mode of creating dividends, is an idea which no sound lawyer, or honest judge, could entertain under any circumstances. It is not a proposition admitting of any question or doubt, or of being made clearer by argument.

The question arose before Vice-Chancellor, now Lord Justice, WOOD, in the recent case of *Bloxam v. The Metropolitan Railway Co.*, and the decision was most unequivocal, in favor of the denial of all colorable dividends, even in anticipation of suspended earnings, and which it was confidently believed must be realized in a very brief period. The English courts have been resolute upon this point, as the only possible mode of enforcing honest management and proper accountability, both to the shareholders and the public. Unless this distinction between the distribution of net earnings among the shareholders, and the surrender of the capital stock, or a portion of it, to them, is strictly maintained, there is no security for any one having any connection with the company. The shareholders will never be able to know their value, and the general public, who may be inquiring for safe investment, will be equally in the dark. And so long as the capital stock of these companies is looked to as a means of investing funds, this rigid mode of management is indispensable, and it is quite impossible to even argue the contrary. And no

right-minded man can entertain any feelings of revolt, or reluctance, against the strict enforcement of this doctrine of the courts. It is only in the view of creating mere fancy or speculative stock, that the opposite doctrine could gain any countenance whatever; and one would not expect such practice to receive much encouragement, either from the courts, or from prudent men of any class.

Yet there has been considerable clamor in Great Britain, from sources entitled to more or less consideration, in regard to the disastrous effects of the decisions of the courts upon this subject. But we cannot comprehend why there is any ground of complaint, or blame, in regard to the course pursued by the courts. The misfortune seems to have been, that the railway companies should have persisted in declaring dividends, to the same extent, in times of small returns, as when the earnings had been much larger; or that they should have felt such reluctance in foregoing the regular semi-annual dividend, in any emergency, where larger outlays were demanded, thereby absorbing the entire earnings of the company for six or twelve months in succession. The indiscretion and misconduct seem to have lain altogether at the door of the managers of the companies, in so conducting their affairs as to admit of fair excuse for bringing the matter before the courts. We know it is not always possible to escape captious appeals to the courts; but such appeals are not commonly damaging to the party attacked. It is only when the proceeding proves to be well founded, that any serious consequences, in depreciating stock, are likely to occur. It has certainly proved so in England. The London, Chatham and Dover Company has only suffered to the extent of its mismanagement out of court, and in no sense in proportion to the amount or character of its legal controversies. And the same is true of the Caledonian Railway Company in Scotland, and the London Metropolitan Company. And although it must be admitted there has arisen, in Great Britain, considerable distrust in regard to railway stocks, and that this has occurred contemporaneously with an unusual amount of railway litigation, it is not by any means apparent, that the disposition of the courts of equity to hold them up to the most rigid accountability and strict legal conduct of the affairs of the several companies, brought in question, has had any tendency to increase that distrust. We are quite confident, on the contrary, that the firmness of the

courts has had a large influence in allaying such distrust, when it was unreasonably excited, and in preventing its occurrence where we might otherwise have expected it to arise. It is safe to affirm that this will always be so in a well-informed and well-ordered state of public sentiment, and that the clamor against the resolute interference of the courts does not ordinarily arise from those parties who are content with the fair conduct of corporate interests, and equal justice to all. We may be permitted to suggest here, that there may have been already too many railways built, either for profit or convenience; since, if a section of country once obtains that convenience, it is far more helpless after being deprived of it than it would have been if it had always remained without one. And railways, or any other class of public works, which will not prove, and cannot be made, reasonably remunerative, will of necessity fall into decay, and ultimately into disuse. The only proper test of the necessity and permanent utility of railways must, like every other burden upon the property of a country or nation, be determined by the inquiry whether the traffic is sufficient to pay the running expenses, and a living compensation for the investment, unless that question can be affirmatively answered, it will be in vain to attempt to force the matter.

It may prove a gratifying speculation to many sections of country, to build, or attempt to build and maintain, railways upon mere credit, or voluntary subscriptions; and the thing is often done with the hope of thereby bringing out the undeveloped resources of the region, or those hoped to be found there. And there may have been some rare cases where such rash experiments have proved successful, but the general rule must always be in the opposite direction. There may be some men, under the infliction of oppressive taxation, who would rejoice to have any possible mode of escape opened to them. And in their desperation there may be some statesmen, or men in positions where, by courtesy, we should feel bound to expect statesmanship and far-seeing wisdom, who will be so rash as to expect to maintain the national credit abroad, by reducing the taxation below the point of meeting the current expenses of the government and the interest on the public debt, and who are simple enough to believe that it will make no difference how the money to meet the deficiency is raised, provided only that the interest on the public debt is

promptly paid. But experienced and prudent statesmen know well enough that it will be quite impracticable to maintain the public credit abroad, or at home even, in any other possible mode than by actually meeting the current expenses of the government, including the interest on the public debt, by the annual income of the government. It will be in vain to prove the immense resources of the country, and the ultimate certainty of the payment of every cent of public debt and interest. Nobody cares for such speculations, so long as he sees, before his own eyes, the clearest possible evidence of incapacity, or, what is the same thing, unwillingness to meet the present demands of the public expenditures. And the same is true of all associated or corporate debt. If the remunerative return for the capital invested is not raised from current earnings, it is the same as if it were not raised at all; and the creditors or holders of the stock will find poor consolation for the failure to meet the obligation now resting upon the debtor, that he is assuming still further obligations of the same character; thus compelling the necessity of falling deeper and deeper into the gulf from which there is no possible escape but by liquidation from present resources.

It is therefore useless and hopeless for any country to attempt to construct railways, where the expected traffic will not prove remunerative for all current expenses and invested capital. And the developments in regard to railway investments in Great Britain, show conclusively, that branch roads, which have now become very numerous on the main lines, and many very extended lines, in regions affording small traffic, either in freight or passengers, are only a dead weight upon the main lines, which would otherwise prove remunerative.

What we have here intimated in regard to the indispensable necessity of keeping railway management within the strictest legal boundaries, has been largely suggested, and constantly confirmed, by all that we have been able to see or learn of railway management in Europe. In England, and to some extent in the other departments of the United Kingdom, there has arisen, within the last two years, very great distrust in regard to the ultimate soundness and value of railway shares, chiefly in consequence of discovering a disposition in many of the more extended lines greatly to enlarge their capital stock, which was constantly indicated by the repeated applications to Parliament for enlarged

powers of that kind, more or less disguised by combining others therewith.

This naturally led to inquiry and investigation, and that called forth the standing excuse, that branch roads and extended lines, and their equipment and operation, made this large increase of capital indispensable. But upon more careful scrutiny, and critical inspection of the management of some of the lines, it was discovered that this immense extension of the connecting lines, which has converted all England into a continuous iron network, had not generally been attended with a proportionate increase of remunerative traffic. And it seems now pretty generally conceded there, that the extension of railway facilities in England has been quite overdone, and has really driven the directors into the adoption of expedients to meet their regular dividends, which were altogether indefensible, but which it is not easy to check, unless through the intervention of the courts; and that this, although a severe remedy, is far better, for all interests concerned, than quiet acquiescence in a system of management which is illegal, and in the end surely destructive.

II. There is a movement in Parliament, at the present time, for the government to purchase all the telegraphic lines in the United Kingdom, and connect that entire interest with the General Post-Office. This will prove most unquestionably a movement in the right direction, so far as business interests are concerned; and we see no reason to question the perfect propriety and practicability of bringing telegraphic correspondence under the same national supervision and control with the ordinary postal correspondence. And either, or both, may be so conducted, if that is specially desired, as to prove very nearly, if not entirely remunerative. We do not expect to see the same thing done, in form, in our own country, at present certainly. It will be many years, possibly, before the interests of contending factions will become so far combined, or so entirely identical with the public interest, as to enable the national government coolly and deliberately to consider questions of such grave and vital consequence, with that exemption from all partisan bias, which would be requisite in order to reach a conclusion likely to prove permanently satisfactory to all, and wisely consistent with the highest good of the vast commercial and governmental interests of the country. But we should hope that the period is not to be indefinitely deferred,

when our National Congress shall contain such a proportion of men of sufficient scope and comprehension as to enable the whole body to perceive that the telegraphic correspondence of such a vast empire is clearly of national concern, and one that imperiously demands the supervision and control of national legislation and of the national judiciary. This is the only possible mode in which the system can be made really efficient in accomplishing its greatest good for all parties and interests, and at the same time upon just and reasonable terms.

And it may not be out of place here to suggest that the practice of the Continental States in Europe affords a very satisfactory argument in favor of regarding both the railway and the telegraphic interests as exclusively of national concern. Thus, in Austria and many of the German States, and to some extent in Prussia, and exclusively in Russia, both these interests are essentially carried forward at the national expense, and through the action of official agencies; and in France the railways will all revert to the government in a brief period. And the telegraphic facilities are afforded throughout the Continental States, on terms more reasonable as to compensation, and in other respects far more satisfactory, than either in England or the United States.

We have so often discussed the question of the national supervision of our railway interest, that we feel reluctance to pursue it further on the present occasion. But no one can examine and patiently consider the vast and increasing extent and controlling influence of that interest, in all the states and dependencies of Europe, and not feel surprise, that while Congress is rushing with such ardent zeal into matters not only not expressly delegated by the United States Constitution, but, in the opinion of many, expressly, or constructively, prohibited by that instrument, it should not find time or inclination to give attention to the supervision and control of the railway and telegraphic interests of the country, which are so intimately and vitally interwoven with all national interests and independent action as to leave no ground to question either its importance or national character.

III. But there is one other subject connected with railway management and responsibility to which we desire to devote some consideration here. We refer to the exact limits of responsibility, and the precise measure of care and diligence which the law imposes upon, or requires of, passenger carriers by railway. We

have been so long accustomed to define this diligence and responsibility by reference to, and comparison with, that of common carriers of goods, and to consider the former as of an inferior degree, as compared with the latter, that it seems to us the profession are not fully sensible of the real extent of the responsibility which the law imposes upon railway passenger carriers. The more we have studied and attempted to define this distinction between the degree of responsibility imposed upon railway passenger carriers and common carriers of goods, the more clearly we have felt that the difference is rather formal than substantial. The cases all agree, that passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and that if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible, as well in the case of passengers as of goods. In the latter case it is said that the carrier is absolutely bound to safe delivery, and not in the former. But in the case of goods, the carrier is excused for loss or damage occurring from the misconduct of the owner, either in package or storage, or stowage in regard to any other thing when he assumes to act, or direct, on his own responsibility. And he is not responsible for damage occurring from inevitable accident or irresistible force, or, as it was formerly said, for those results which follow from the act of God or the King's enemies.

And when we admit all these excuses for passenger carriers, there remains very little, or nothing more, which the law recognises as an adequate excuse for any damage occurring during the transportation. We are accustomed to suppose that damage occurring from the want of more perfect appliances for passenger transportation, is not chargeable to the carrier; and we are not aware that this precise point has been decided. It is, indeed, not always easy to determine precisely the effect of any particular defect existing in the appliances in actual use upon any particular line of railway where damage occurs, and what might have been the exact result if the appliances had been as perfect as possible. And so, too, of the management of the particular train, at the time the injury occurred, it is not always a point upon which skilled and experienced men agree, what might have been done more or different from what was done to insure safety. And there

are many that suppose the passenger assumes all the risks resulting from such deficiencies as are apparent to all, and therefore presumably known to him. As for instance, when it can be shown, with reasonable certainty, that if there had been a double track no damage could have occurred at the time, or in the mode, in which it did, the opinion is not uncommon, we believe, that this will not fix the responsibility of the carrier; but we consider this opinion to be altogether erroneous. For if this view can be entertained, and carried to its logical results, it will go a long way towards excusing passenger carriers for all damage which is not the result of some degree of negligence at the very time it occurs.

For if railway companies may excuse themselves from responsibility for damage to passengers, by proving the most obvious and criminal defects in the construction and equipment of their roads, or in the use of the commonest precautions to insure safety, there will be no security for railway passengers. We must either eschew railway travelling altogether, or else understand, that in entering a railway carriage, we take our lives in our own hands. It would almost seem that the railway managers in our country have adopted some such theory of absolute immunity from all responsibility, or they would not dare expose their passengers to such awful perils. It is but just to say, that the barbarous and inhuman sacrifice of such multitudes as has occurred, in repeated instances, in our country during the last year, presents a problem which it is quite impossible for people in other countries to solve, and for which it is not easy for the most friendly disposed to invent any sufficient apology or excuse.

And when we reflect how these things are managed in England, by means of actual signals from station to station, showing a clear track before any train is allowed to pass; and especially in some of the continental countries, like Austria and Bavaria, and other German States, and elsewhere, where electric telegraphic stations are maintained at very short intervals, with operators whose sole employment is to know that all is right on the advancing line, and to bow the trains along by the graceful touch of the hat as they pass; when we pass along these lines, with double tracks throughout, and a perfect road-bed and superstructure and equipment, and all these telegraphic precautions in addition, we cannot but feel surprised that public opinion in America will tolerate

such terrible destruction of life, such horrid mangling of bodies and limbs, and literal burning alive, as has occurred there within the last few months. One feels the inexcusable character of these outrages more keenly while surrounded by those who are so incapable of comprehending how it is possible for them to occur. We hope the time is not very remote when our courts will be able to place themselves upon the proper theory on this subject, that any person, natural or corporate, who undertakes the transportation of passengers by the dangerous element of steam, and with the great speed of railway trains, must be held responsible for the use of every precaution which any known skill or experience has yet been able to devise, and that passengers are not bound to judge for themselves how many of these precautions it is safe to forego.

It is no excuse that the public desire cheap and rapid travelling in all directions and everywhere. We do not allow every one, at will, to build railways, and to manage them in his own way; and if the government professes to control these matters at all, it is bound to do it effectually. And if it were made a matter of national supervision, it would be much easier to do so, and thus prevent these daily tragedies, which we have almost ceased to regard in consequence of their frequency. We do not allow monomaniacs or brigands to commit suicide or murder at pleasure without interference, because it is their pleasure or their interest to do so; and we see no good reason why railway passengers, or railway managers, should be allowed to roast a hecatomb, in human sacrifice, because it seems convenient or desirable to the one or the other class concerned in the immolation, or because the one class demands and the other consents to use a mode of passenger transportation which inevitably produces these results.

The truth is, that common juries, with their higher instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation, in the light of higher and fuller responsibility than either the courts or the profession. It is not uncommon to hear it objected, in our country, against the wisdom or justice of jury trials, that the result is always the same in all actions for injuries to passengers on railways; the companies are sure to be cast in the actions. And this seems to be regarded as an unanswerable reproach. But when we reflect how much more might be done, in all such

cases, to secure perfect safety and exemption from injury ; and how much more really is done, both in Great Britain and on the continent of Europe, we can only conclude, that the common-sense interests of jurors have raised them to a higher plane of wisdom and justice than that which the courts, or the profession, have yet attained.

We do not feel prepared to say that a railway company who undertake the transportation of passengers, are absolutely bound to safe delivery, the same as common carriers of goods, inevitable accident, irresistible force and the misconduct of the party only excepted ; but we must confess, in all sincerity, that the distinction which we have all taken so much labor and pains to maintain, between these two classes of carriers, is rather shadowy and unsubstantial. And it seems to us that since the introduction of railways we are able to comprehend more fully, that the distinction is really without much just foundation. If no railway company is to be excused for any injury occurring to its passengers, until the company has done all that it was in its power to do to guard against the occurrence of injuries of that character, it will be a long time before we shall hear the repetition of the charge as a reproach, that juries always find against railway companies in such cases. They will be expected to find so. And for one we shall expect that all the excepted cases will soon be reduced to those which exist in the case of common carriers of goods. For if railway passenger carriers are bound to do all for the security of their passengers which human care, skill and diligence can effect, and if this is to be measured by what is known and done in like cases throughout the world, and the passenger is not presumed to exercise any judgment upon the subject, unless, or until he consents, in terms, expressly to assume some portion of the risk himself, or constructively does so by violating the regulations of the company, or by needlessly exposing his person, we do not see but the carrier must show, in order to excuse an injury to a passenger, that it resulted from inevitable accident or irresistible force, or was the fault of the passenger. If the carrier is bound to do all that it is possible to have done to prevent the occurrence of injury to his passengers, and really performs his duty, and injury still occurs, it must of necessity be an occurrence in the nature of things inevitable or irresistible. I. F. R.

LONDON, April 10, 1868.

RECENT AMERICAN DECISIONS.

Supreme Court of Appeals of Virginia.

DE VOSS ET AL. v. THE CITY OF RICHMOND.

The power of a municipal corporation to borrow money is entirely distinct from those powers bestowed upon it for public purposes, and pertaining to its functions as a local government, exercising a part of the sovereignty of the state.

In the exercise of a power to borrow money, a municipal corporation, *quoad hoc*, is to be treated as a private person or an ordinary trading corporation, and will be held to the same degree of responsibility for the acts of its officers and agents.

Where a city issues its registered bonds, and invites the public to deal upon the faith of them as the ultimate evidence of title, it cannot be heard to gainsay their validity in the hands of a *bond fide* holder, although in the issuing of the bonds the agents of the city violated their instructions.

Therefore, the city of Richmond was estopped to deny the validity of a registered bond regularly transferred and in the hands of a *bond fide* purchaser, even though such bond was issued by its transfer officer in disregard of instructions to make a certain recital on the face of the bond, which if made would have notified the purchaser of the facts creating the alleged invalidity, and this because, by its ordinances, the city had declared that the delivery of a registered bond, with a power of transfer, should operate to pass the complete title, both at law and in equity, to a *bond fide* purchaser; saving, that all payments by the city to the registered owner should be deemed valid.

THIS was an appeal from a decree of the Circuit Court of Richmond, in Equity.

In 1862, Asa Otis, a citizen of Massachusetts, was the owner of a registered bond of the city of Richmond for \$2300. By a decree of a court commissioned by the Confederate government, the title to this bond was confiscated, and the city of Richmond issued a new bond to Henry S. Brooke, receiver. Under an ordinance of Richmond, it was the duty of the auditor, in issuing such a new bond, and in all future transfers of it, to recite on its face that it was issued in obedience to a decree of the court, and on account of certain other bonds confiscated by the decree. This was done on the bond issued to Brooke.

In October 1862, the bond to Brooke was surrendered and a new one issued to defendants Maury & Co., and in February 1863, this in turn was surrendered and a new one issued to defendant De Voss. In both of these last cases, however, the auditor inadvertently omitted to recite that the bonds represented an original that had been confiscated; and the transactions having

been through a broker, neither Maury & Co. nor De Voss had actual notice of that fact.

The power of the city of Richmond to borrow money and issue evidences of indebtedness therefor, is unlimited. The city declined to recognise De Voss as a creditor, and filed a bill in the Circuit Court against De Voss, Maury & Co., and Otis, setting forth the facts, and praying that the bond to De Voss might be decreed void and surrendered for cancellation. It was conceded throughout that the decree of forfeiture as to Otis was utterly void.

The Circuit Court, MEREDITH, J., decreed the bond void, and ordered it to be surrendered. From this decree the present appeal was taken.

James Alfred Jones, for De Voss.

Page & Maury, for Maury & Co.

R. T. Daniel, for the City of Richmond.

The opinion of the court was delivered by

JOYNES, J. (after stating certain points that the court had not felt called upon to consider).—I shall assume, for the purposes of the case, as was assumed in the argument, that the decree of confiscation, and the proceedings under it, did not affect the title of Otis to claim payment of the bond held by him, or, of themselves, give validity to the bond held by De Voss. And besides, it would not be competent to consider the effect of that decree as between the city and Otis, because no such question has been raised in the pleadings. Whatever may be the rights of De Voss, the city is not at liberty, on the present pleadings, to controvert the title of Otis.

It is conceded that the bond held by De Voss was executed and issued to him by the officers of the city to whom was intrusted, by its laws, the general duty of executing and issuing bonds. In the argument for the appellants, these officers were treated as the agents of the city, and the general principles of the law of agency were regarded as applying to the city in respect to the acts and functions of such officers, in like manner as to other corporations and their officers and servants.

For the appellee it was contended, that the functions of these officers, in reference to the execution, transfer, and renewal of

bonds of the city, pertain to the execution by the city of the powers and duties devolved upon it in the character of a local government, and that the city cannot be held liable for their misfeasance or negligence in the discharge of their functions, according to the principles on which this court proceeded in *City of Richmond v. Long's Adm'r.*, 17 Gratt. Rep. 375.

But that principle has no application to this case. The power which was in question in the case referred to, was one of those conferred upon the city for public purposes only, and pertained to its character as a local government. It was not conferred with any view to the private advantage or emolument of the city. But the power to borrow money is bestowed primarily for the advantage and benefit of the city. It has no direct relation to the powers and duties of the city as a local government. It may be exercised, in a particular case, with a view to the better execution of those powers and duties, but it is not essential to their execution. It involves no exercise of sovereign power over the persons or property of the citizens, but is such a power as may be exercised by a private individual, or by an ordinary trading or commercial corporation. Such a power is entirely distinct, in contemplation of law, from those which are bestowed upon the city for public purposes only, and pertain to its functions as a local government, exercising, for that purpose, a portion of the sovereign power of the state. The city is *quoad hoc* a private corporation. This distinction is taken by Sir LLOYD KENYON, Master of the Rolls, in *Moodaly v. East India Co.*, 1 Brown C. C. 469. The plaintiff had taken a lease from the company, granting him permission to supply the inhabitants of Madras with tobacco for ten years. Before the term was out the company dispossessed the plaintiff, and granted the privilege to another. The plaintiff filed a bill of discovery, with a view to bringing an action against the company. It was objected, on behalf of the defendants, that the act complained of was incident to their character as a sovereign power, and could not be made the subject of a suit. His Honor admitted that no suit would lie against a sovereign power for anything done in that capacity; but he held that the defendants, in that case, did not come within the rule. He said, "They have rights as a sovereign power; they have also duties as individuals. If they enter into bonds in India, the sums secured may be recovered here. So in this case, as a

private company, they have entered into a private contract to which they must be liable."

The power to borrow money is of course a discretionary power, to be exercised or not at the pleasure of the city, and in such manner as it may see fit. But when the city, through its proper authorities, has determined to exercise this power, and has prescribed how the bonds shall be executed, how they shall be transferred, and how new bonds shall be issued to the assignees, duties devolve upon the city which are absolute and purely ministerial. The holder of a bond has a right to transfer it. The city is bound to allow the transfer, to make the proper registry, and to issue a new bond to the assignee. For a refusal to perform these duties, an action will lie against the city, though perhaps the performance of them cannot be enforced by *mandamus*: *Angell & Ames on Corp.*, §§ 384, 710. The city may, and indeed must, from the necessity of the case, confide the performance of these duties to officers and agents, but they perform them in the place and stead of the city; their acts in the execution of these duties are the acts of the city. They are the mere agents and servants of the city, and in such a case the maxim *respondet superior* applies: *Sawyer v. Corse*, 17 Gratt. Rep. 230. See *Bailey v. Mayor, &c., of New York*, 3 Hill Rep. 531; *City of Dayton v. Pease*, 4 Ohio N. S. Rep. 80; *Clark v. Mayor, &c., of Washington*, 12 Wheat Rep. 40; *Thayer v. Boston*, 19 Pick. Rep. 511; *Weightman v. Corporation of Washington*, 1 Black Rep. 39; *Conrad v. Ithaca*, 16 N. Y. Rep. 158.

It was contended for the appellee, that De Voss must be taken to have had notice of the character and history of the bond issued to him. It is not pretended that he had actual notice, and it is very clear that he did not have such notice. But he purchased the bond from R. H. Maury & Co., by whom it was transferred to him in February 1863, and it was transferred to them in October 1862, by H. S. Brooke, receiver under the decree of confiscation. From this it is argued, De Voss must be charged with constructive notice of the character of the bond, which he might have ascertained if he had traced it back through the books of the auditor. But I do not think so. The bond delivered to De Voss by Maury & Co. was perfectly regular on its face. De Voss had no reason to suspect that it was a bond issued in lieu of one that had been confiscated, but he had the best

reason to believe the contrary. For 1, The bond did not contain the statement which such bonds were required to contain by the resolution of the council; and 2, Maury & Co. knew that De Voss would not purchase such bonds, and their delivery of this bond to him was an assurance that it did not belong to that class. It does not appear that he ever saw the bond which Maury & Co. held; but if he had seen it, that too was regular on its face. There was nothing, therefore, to excite his suspicion or to put him on inquiry. All that can be said is, that he might have ascertained the fact if he had gone to the auditor's office, and traced the bond back to its source. But that is not enough to charge him with constructive notice of what he might thus have ascertained, in the absence of anything to put him on inquiry: 2 Rob. Pr. 29; Opinion of CABELL, J., in *French v. Loyal Co.*, 5 Leigh Rep. 627. And according to the recent cases in England, a party will not be charged with constructive notice unless the circumstances are such that the court can say, that it was his duty to acquire the knowledge in question, and that his failure to obtain it was the result of culpable negligence; it is not enough that he should, from a want of prudent caution, have neglected to make inquiries, but he must have designedly abstained from such inquiries for the purpose of avoiding knowledge; there must be a wilful blindness, and not mere want of caution: *Jones v. Smith*, 1 Hare Rep. 55; s. c. on appeal, 1 Phillips Rep. 244; *Ware v. Lord Egmont*, 31 Eng. L. & Eq. Rep. 89. It was argued that De Voss claims under assignment from Maury, and that it was his duty to look to Maury's title, by tracing the bond back through the previous transfers. This, however, is not the title which De Voss holds. He holds a new bond given directly to himself. The nature of this title will be more fully considered hereafter.

The validity of the bond held by De Voss is controverted on the ground, that the officers of the city by whom it was issued exceeded their authority in doing so. This objection is founded on the resolution of the council passed April 14th 1862. This resolution directed, 1, That bonds of the city should be issued to H. S. Brooke, receiver, in obedience to the decree of confiscation; and 2, in substance that it should be stated on the face of such bonds, and also on the face of all others that might be given in place of them, in case of transfer, that they were issued in place of bonds which had been confiscated. The object of this last

provision was to give notice to purchasers of this class of bonds, so that they should cease to be binding on the city in case the decree of confiscation should be overthrown by the event of the war.

It is undoubtedly true that it was the intention of the council that no bond, in lieu of a confiscated bond, should be issued, in any case, without the special statement on its face required by the resolution. The prohibition is as plain as if the language of the resolution had been in the form of express prohibition. As between the city and the officers, therefore, it limited, in respect to this class of bonds, the authority of the officers.

But the authority of these officers to transfer bonds and to issue new ones, was not derived from this resolution. They had a general authority for these purposes, conferred by the ordinance. They had long been in the habit, also, of making such transfers and renewals, from which the public might have inferred a general authority to do so. This resolution, with a view to the protection of the city, directed the officers not to exercise their authority in respect to this particular class of bonds, except in a particular way. The officers were relied upon to observe this direction, and it does not appear in the record that the resolution was ever communicated to the public. There appears to be strong ground, therefore, to say, as was contended by the counsel for the appellants, that, in respect to the public, this resolution did not operate as a limitation of the apparent power of the officers, which remained the same as before, but was only in the nature of private instruction as to the manner in which they should execute their authority in particular cases. If so, it is clear that the act of the officers in issuing the bond to De Voss, in conformity with their apparent authority, was not vitiated by their omission to observe the direction contained in the resolution. But under the ordinance the officers had no authority to issue a new bond without the surrender of the old one, except in the case of a lost bond. The power to make the first issue of bonds in place of those which had been confiscated, was derived, therefore, from this resolution alone. It was conferred on special terms in this, that the bonds were to be in a particular form, which was prescribed for an important purpose. Every bond that might be issued in place of these was also to have the same form.

In this view it may be contended, that this resolution had the

effect, in respect to this class of bonds, of taking away from the officers the general power which they before had, and of substituting for it a new and limited authority, of which the public must take notice. I do not think it worth while to discuss this question, and will assume, for the purpose of the argument, that the view just stated is a sound one.

Assuming that the officers had thus only a limited authority, of the extent of which the public were bound to take notice, in respect to the renewal of this class of bonds, the counsel for the appellee contended that the bond held by De Voss, which was not issued in conformity with this authority, cannot be held binding on the city. The counsel for the appellants contended, on the other hand, that the city cannot be allowed to avail itself of this defence against De Voss, who took the bond issued to him without a knowledge of the fact that the officers exceeded their authority in issuing it. And I think this position may be maintained on principle and authority.

The city of Richmond is authorized by its charter to contract loans without limit as to amount, and to issue bonds or certificates of debt for the money borrowed. It provided by an ordinance, which is a transcript of a law of the state (Code of 1860, p. 264), for the execution, transfer, and renewal of these bonds or certificates. They are to be under seal, to be registered in the office of the auditor, and to be subscribed by the President of the council and the Chamberlain. Upon the surrender of a certificate at the office in which it is registered, a transfer may be made of the whole amount, or any part thereof, by the person appearing on the books to be the owner, or by another having a power of attorney from him to make the transfer. When a transfer is made, the old certificate is to be cancelled and filed in the office of the Chamberlain, and one or more new certificates issued. New certificates may be obtained by a holder, on application, in the place of an old one, when there has been no transfer. Every new certificate is to be registered, signed, and countersigned like the former one. When a certificate has been lost, the holder may obtain a new one on affidavit and three months' advertisement of the loss, and upon giving bond and security to indemnify all persons against any loss by reason of issuing the new certificate. The same ordinance also provides, that the person appearing on the books of the office in which any certificate is registered

as the owner thereof, shall be deemed the owner as regards the city, so as to make valid all payments to him on account thereof, made before a transfer of the certificate on the books of the office. But if the person so appearing on the books as owner, shall, *bond fide* and for valuable consideration, sell, pledge, or otherwise dispose of a certificate to another, and deliver to him the certificate with power of attorney authorizing the transfer thereof on the books of the proper office, the title of the former to said certificate (both at law and in equity) shall vest in the latter, for the whole amount of the certificate, or so much thereof as may be necessary to effect the purpose of the sale, pledge, or other disposition; and it shall so vest, not only as between the parties themselves, but also as against the creditors of, and subsequent purchasers from the former, subject to the last preceding provision in respect to payments by the city.

Under these arrangements the bonds of the city were put upon the market. It is manifest that a leading object contemplated by these arrangements, was to give security to the title of holders of the bonds, and thus to promote their credit. If the bonds had been made so as to pass by assignment merely, each successive assignee would have taken only an equitable title, and the bonds in his hands would have been subject to the same defences to which they would have been subject in the hands of any prior holder. It is provided, however, that upon each successive transfer a new bond shall be issued in the name of the transferee, which will give him a legal title to demand payment of the money. See *Union Bank v. Laird*, 2 Wheat. Rep. 390; *Black et al. v. Zacharie & Co.*, 3 Howard Rep. 483; *Fisher et al. v. Essex Bank*, 5 Gray Rep. 373. So an assignee for value who receives a bond from the holder, with a power of attorney to transfer it, acquires, under the ordinance, the legal title of the holder before a transfer on the books; subject only to the right of the city to make payment to the registered owner. The new certificate, or the delivery of an old certificate, with a power of attorney to transfer it, will cut off all defences which the city might have against any prior holder. For the question whether the holder of an obligation for the payment of money is subject to the defences of the debtor against a prior holder, depends, in the absence of notice or fraud, upon the character of his title, as legal or equitable. If it is an ordinary chose in action, and therefore only assignable in

equity, it is subject to all the rights, legal and equitable, which the debtor had against a former holder. For while a court of equity will sustain the rights of the assignee, it will also sustain the rights of the debtor existing before notice of the assignment; and these, being prior in time to those of the assignee, prevail over them. But where the assignee takes the legal title, without fraud or notice, this principle does not apply; the title of the holder is absolute, and all defences of the debtor against prior holders are cut off.

The *bond fide* holder of a bond issued to him stands, therefore, in this respect, in the position of the holder of a bill of exchange or negotiable note. This is conclusive to show that he is not bound to look behind the bond. The city cannot deny the title of the registered owner, who still holds his bond. Any other principle would lead to embarrassment and inconvenience, and greatly impair the credit of the bonds. To require a holder to investigate the previous history of his bond, he must examine the books in the auditor's office and the files in the chamberlain's office, which are not open to public inspection. It would often be impossible for him to trace the history of his bond from the union, under one name, of a number of bonds bought from different persons. On the other hand, it is the duty of the officers of the city to make every necessary investigation, at each successive transfer, and they have all the means of doing so.

It is of the very nature of such a bond, and the very object for which it is issued, that it shall furnish authentic and conclusive evidence of the holder's title to demand the money it calls for. Such is the general understanding upon which such bonds and stocks are bought and sold in the market, and any other principle would be fatal to the credit of such securities. In *Davis v. Bank of England*, 2 Bing. Rep. 398 (9 Eng. C. L. Rep. 444), when the bank had permitted certain stock in the public funds standing on the books of the bank to be transferred under a forged power of attorney, the Court of Common Pleas said: "We are not called on to decide whether those who purchase the stock transferred to them under the forged power, might require the bank to confirm that purchase to them, and to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them, that has been occasioned by the forgeries. But to prevent, as far as

we can, the alarm which an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been the object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfer to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice even to attempt to look further, than the bank books for the title of the person who proposes to transfer to you." In conformity with these views, it was held in *Bank of Kentucky v. Schuylkill Bank*, 1 Parsons' Sel. Cas. 180, in reference to spurious stock issued by an agent of the bank, and transferred, from time to time, to innocent purchasers, that against *bonâ fide* holders of such stock, the bank would be estopped from going beyond its last certificate, in any question between the bank and such holder touching the obligatory force of such certificate on the corporation, p. 250. To the same effect is the opinion of REDFIELD, J., in *Sabin v. Bank of Woodstock*, 21 Verm. Rep. 353; cited with approbation in *Fisher v. Essex Bank*, 5 Gray Rep. 373.

The common course of business in the sale and purchase of such bonds, shows that such is the general understanding as to the character and effect of the bond. A party having a bond to sell delivers it to a broker, with a power of attorney authorizing an attorney to transfer it to —, the name of the transferee being

left blank. When a purchaser is found, the blank is filled with his name, the transfer is made in the books, and a new bond issues to the purchaser. The purchaser takes the bond, but he seldom knows, and never cares, who held the previous bond.

There is nothing unreasonable or harsh in holding the city to be estopped from disputing the title of De Voss. On the contrary, it is highly just and reasonable. The city appointed officers to issue its bonds in whom it confided. It knew that its bonds were the subject of daily traffic in and out of Richmond. From the nature of the business, it must have expected and intended the public to confide in their officers. There were two classes of bonds to be issued, and the class to which each bond belonged was to be indicated by its form. The officers were specially intrusted by the city with that duty; they had the means of knowing the first in every case, and could not make a mistake without gross negligence. These means were not equally open to the public.

Under these circumstances it was natural that purchasers should presume that the officers did their duty. They had a right to rely on such a presumption in their dealings.

Indeed it was necessary for them to do so, and it would be unjust to allow the city to say to them, when they dealt in good faith, that they ought not to have relied on it.

The case of *The Royal British Bank v. Turquand*, 5 El. & Bl. Rep. 248 (83 E. C. L. R.), was an action against the official manager of a railway company (that being the mode of suing the company), upon a bond for 2000*l.*, payable to the plaintiff, and signed by two directors, under the seal of the company.

There was a plea setting out a clause in the deed of settlement of the company, which provided that the company might borrow on bond, such sums as should, from time to time, by a general resolution of the company, be allowed to be borrowed, and averring that there was no such resolution authorizing the making of this bond. The Court of Queen's Bench held the plea to be bad. The judgment was affirmed in the Exchequer Chamber, 6 El. & Bl. Rep. 327 (88 E. C. L. R.). JERVIS, C. J., delivering the opinion of the whole court, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they

are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so, on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the documents, appeared to be legitimately done."

In the case of *The Prince of Wales Co. v. Harding*, E. B. & E. 188 (96 E. C. L. R.), which was an action against the official manager of the Atheneum Assurance Company upon a policy, the deed of settlement provided (sect. 20) that the common seal should not be affixed to any policy except by the order of three directors, signed by them and countersigned by the manager, and that (sect. 28) every policy should be given under the hands of not less than three directors, and sealed with the common seal. The policy in question was sealed with the common seal and signed by three directors, one of whom was manager, but there was no previous order made, as required by the 20th section. The case was elaborately argued by the most eminent counsel. It was contended for the defendant that the previous order required by the 20th section, was a condition precedent to the power of the directors to affix the seal to the policy, that the directors were agents with limited authority, that those who contracted with them had notice of the limits, because the statute conferred the authority, subject to the provisions of the act and of the deed of settlement which was registered for public inspection, and that the shareholders, as the principals, had a right to repudiate every policy not executed in pursuance of the authority given to the directors. The Court of Queen's Bench, in an elaborate judgment, overruled this argument, and held that the policy was binding on the company.

It was held that a person receiving a policy in good faith had a right to presume that the directors who signed it had done their duty, and that they had the preliminary order for executing it.

The case of *The Royal Bank v. Turquand* was cited with approval by the Supreme Court in *Commissioners of Knox County v. Aspinwall*, 21 How. Rep. 539. The board of commissioners of a county were authorized by statute to subscribe for railroad stock and to issue bonds of the county therefor, in case a majority of the voters of the county should so determine, after a certain notice should be given of the time and place of election.

The board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute. The required notice was not given, and it was contended that, consequently, the power to issue the bonds was never vested in the board. It was conceded by the court that every person dealing in the bonds was chargeable with a knowledge of the statute under which they were issued, and that as the board was acting under delegated authority, he must show that the authority was properly conferred. But it was held, 1. That as the bonds imported on their face a compliance with the law under which they were issued, the purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power. "The purchaser of the bonds had a right to assume that the vote of the county, which was made a condition of the grant of the power, had been obtained, from the fact of the subscription by the board to the stock of the railroad company, and the issuing of the bonds." 2. That upon the true construction of the statute, the board were the proper judges whether a majority of the votes in the county had been cast in favor of the subscription. The court said: "The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription, and to have acted without ascertaining it, would have been a clear violation of duty, and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it." "We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power and before the rights and interests of third parties had attached; but after the authority had been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question."

This case has been followed in several subsequent cases in the same court, the latest of which is *Supervisors v. Schenck*, 5 Wall. Rep. 772, decided in 1867. In all these cases, the bonds in question were payable to bearer and passed by delivery. That circumstance was not expressly made a ground of decision in the case of *The Commissioners of Knox County v. Aspinwall*, which

proceeded on the principle of the case of *Royal Bank v. Turquand*, where this instrument was a common bond payable to the plaintiff. In the case in 5 Wallace the opinion, referring to the previous cases, says: "When a corporation has power, under any circumstances, to issue negotiable securities, the decision of this court is, that the *bonâ fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached in the hands of such a holder than any other commercial paper."

This ground of decision is equally applicable to the present case. For as we have already seen, the person to whom a bond of the city of Richmond is issued, and who takes it in good faith, takes a legal title, and is no more subject to defences which might be made against a former holder, than he would be if he was the holder of negotiable paper.

It was part of the duty of the officers intrusted with the transfer and renewal of bonds, to ascertain, in every instance, after April 14th 1862, whether the bond transferred represented a confiscated bond, and to certify whether it did or did not in the form of the renewed bond. When, therefore, these officers failed, in any case, through negligence, to certify on the face of a bond issued by them that it represented a confiscated bond, when such was the fact, it was the common case of an agent acting negligently in the regular course of his employment. The law is well settled and familiar that, in such cases, the principal must bear the consequences of his agent's negligence, as between himself and an innocent third person, even though the act or omission of the agent, which constitutes the negligence, was wholly unauthorized by the principal, or even positively forbidden by him: 1 Parsons' Sel. Ca. 180; 14 How. Rep. 486. Upon this principle a bank is held to suffer for the negligence of its officer, who received from an innocent person payment of a debt in forged notes, which purport to be the issue of the bank: *U. S. Bank v. Bank of Georgia*, 10 Wheat. Rep. 333. So when an officer of a bank, through negligence, pays to an innocent holder a forged check which purports to be drawn upon the bank by one of its customers: *Levy v. Bank of U. S.*, 1 Binn. Rep. 27. And so the bank must bear the loss, where its officer permits a transfer of stock under a forged power of attorney, or is otherwise guilty of negligence or of fraud in the issue or transfer of stock: *Davis v.*

Bank of England, 2 Bingham 393; *Pollock v. National Bank*, 3 Seld. Rep. 274; *Bank of Kentucky v. Schuylkill Bank*, 1 Parsons' Sel. Ca. 180; *Bridgport Bank v. N. Y. and N. H. Railroad Co.*, 30 Conn. Rep. 231; *N. Y. and N. H. Railroad Co.*, 34 N. Y. Rep. 30; *Sewall v. Boston Water Power Co.*, 4 Allen Rep. 277.

The city bonds, as I have said, were put upon the market by the city and were the subject of daily traffic. The public were incited to deal in them, and it was important to the credit of the city that they should do so with confidence and safety. To insure its own safety, and at the same time the safety of purchasers, the city undertook to mark the class of confiscated bonds. Upon principles of good faith and fair dealing, we must consider that the intention was, not only to admonish purchasers as to what bonds they could not buy without risk, but also to inform them as to what bonds they might buy with safety. The absence of a statement in a bond that it represented a confiscated bond, was equivalent to a representation to the person to whom it was issued and to all others who might trade for it, that it did not represent such a bond. It was in law the representation of the city, because made in its behalf by officers charged by it with the duty of issuing all bonds and of representing, on the face of each, whether it did or did not belong to the class of confiscated bonds.

From the nature of the business, the city knew that this representation, conveyed by the form of the bond, would be relied on, and must have intended that it should be. When a party has relied upon it, and in good faith paid his money on the faith of it, it would be the height of injustice to allow the city to say to him that it is not true, and that it was his folly to believe it.

This case therefore falls within the principle of estoppel *in pais*, and the city must be held liable to De Voss to the same extent as if the representation conveyed by the form of the bond was in fact true. It is not necessary, in order to bring a case within the principle of estoppel, that the representation should be made fraudulently, or with a positive intention to deceive; nor, on the other hand, is it enough that it has been relied on, in point of fact, when there was no intention that it should be, or reasonable expectation, from the course of business or otherwise, that it would be.

The principle, as stated by Lord DENMAN in *Pickard v. Sears*, 6 Ad. & El. Rep. 469 (33 E. C. L. R. 115), is, that "when one by his acts or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things existing at the same time." In *Freeman v. Cooke*, 2 Exch. Rep. 663, Baron PARKE, delivering the judgment of the court, said, that by the term "wilfully," as here used by Lord DENMAN, "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man could take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect." Here the duty of making known the truth as to the character of every bond issued after April 14th 1862, was cast upon the city by its own undertaking.

In a case in which a corporation put its bonds upon the market, under certain implied representations inviting public confidence in their validity and value, but where no direct and express representation had been made to the particular purchaser, the Supreme Court said: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced:" *Zabriskie v. C. C. & C. R. R. Co.*, 23 Howard Rep. 381. The same language was repeated subsequently in the case of a municipal corporation: *Bissell v. City of Jeffersonville*, 24 Howard Rep. 287.

It was said in the argument by the counsel for the appellee, that the city itself had no authority, under the charter, to execute the bond to De Voss, because it was not given for money lent to the city, or for any other sufficient consideration. But the city had authority to execute bonds in proper cases without

limit as to number or amount, and, for reasons already mentioned, it cannot allege against De Voss that this particular bond was not executed in a proper case. And it is at least doubtful upon the authorities, whether a corporation can, in any case, allege against a third person who has contracted with it, that its contract was void because *ultra vires*, when the other party had no knowledge of the facts which made it so: *Eastern Counties R. Co. v. Hawkes*, 35 Eng. L. & Eq. Rep. 8; *Bateman v. Mayor, &c.*, 3 H. & Nor. Rep. 323; *Bissell v. Mich. S. & N. Ind. R. R. Co.*, 22 N. Y. Rep. 258. If this had been the case of shares of stock issued in excess of the number directed by the charter, the case would have been different; for, in such a case, as was said in the case of *N. Y. & N. H. R. R. Co. v. Schuyler et al.*, 34 N. Y. Rep. 30, the validity of such shares is a legal impossibility.

There is a class of cases in New York, relied on for the appellants, in which it has been settled, as the law of that state, applicable to all cases of agency, that where, upon comparing the act of the agent with the power given to him, it appears to be such an act as the agent may lawfully do under the power, and the question whether it was in fact done in conformity with the power, or was an abuse of it, depends upon the state of extrinsic facts within the knowledge of the agent, and not known to the other party, such other party has a right to presume that the state of extrinsic facts is such as to authorize the act, and the principal will be bound. The doing by the agent of an act of such a kind that it may be within the power, is regarded as a representation by him that in point of fact it is within it; a representation which, it is held, he has authority from the principal to make, resulting by implication from his employment, and all persons dealing in good faith are held entitled to rely on the truth of this representation: *North River Bank v. Aymar*, 3 Hill Rep. 262; *F. & M. Bank v. B. & D. Bank*, 16 N. Y. Rep. 125; *Exch. Bank v. Monteath*, 26 N. Y. Rep. 505; *Griswold v. Haren*, 25 N. Y. Rep. 596; *N. Y. & N. H. R. R. Co. v. Schuyler et al.*, 34 N. Y. Rep. 30. This doctrine was not established without strong opposition, and was objected to as unsound in principle and in conflict with authority: *Mech. Bank v. N. Y. & N. H. R. R. Co.*, 3 Kernan Rep. 599; Op. of COMSTOCK, J., 16 N. Y. Rep. 125, and cases cited. See also *Stagg v. Elliott*, 12 C. B. Rep. N. S. 373 (104 E. C. L. Rep.);

Mussey v. Beecher, 3 Cush. Rep. 511; *Sears v. Wingate*, 3 Allen Rep. 103; *Mann v. King*, 6 Munf. Rep. 428; *Stainbach v. Read & Co.*, 11 Gratt. Rep. 281; *Same v. Bank of Va.*, Ibid. 269.

If this doctrine is sound, it has a conclusive application to the present case. But I have not found it necessary to invoke so broad a principle, and as there seems to be difficulty in reconciling the authorities, I have thought it best to decide this case upon its own special circumstances, and to leave the general question open until a case shall arise which renders its decision necessary.

I am of opinion that the decree should be reversed and the bill dismissed.

Superior Court of Chicago.

CONNECTICUT MUTUAL LIFE INSURANCE CO. v. WINCHESTER
HALL ET AL.

During a war contracts between citizens of the opposing belligerents are completely suspended, and cannot be enforced even by a proceeding *in rem*.

Therefore a mortgagee of land in Illinois could not sue out his mortgage while the mortgagor was a citizen of Louisiana, which was in insurrection; and a decree of foreclosure made under such circumstances was opened by a court of equity, although the statutory period for redemption had passed.

JAMESON, J.—This is a petition for leave to come in, pursuant to the provisions of chapter 21, section 15, of the Revised Statutes, and file an answer to a bill of foreclosure, on which a final decree was entered in 1862.

The facts upon which the petition, as originally filed, was grounded were that the Connecticut Mutual Life Insurance Company, in March 1862, filed a bill to foreclose a mortgage given by the petitioner and his wife in 1859, upon certain lands in Chicago, to secure a bond for \$8000, payable in 1864, with interest semi-annually. The bill alleged a failure to pay several instalments of interest due according to the conditions of the bond. This suit was prosecuted to a decree of foreclosure, under which a sale of the mortgaged premises was made September 15th 1862. From this sale no redemption was effected. The petitioner stated that of all the defendants in the suit he was the only one

interested therein, the other defendants being merely nominal parties; that he was never served with process in the suit or notified of its pendency until within a few months before the filing of the petition, and that the only ground of jurisdiction in the court to render the decree against him was the publication of a notice in a newspaper in the city of Chicago. As the statute, under which the petitioner sought to come in and defend, fixed three years as the period within which this might be done, and as much more than the three years had elapsed at the time the petition was filed, he sought to avoid the effect of the statute by setting up facts tending, as he claimed, to excuse him for his delay. He alleged that before, and at the time of filing, the bill of foreclosure, and during its progress to a final decree, the petitioner and his wife were, and that they still continued to be, inhabitants of the state of Louisiana; that during the entire period from July 13th 1861 to June 13th 1865, a state of hostilities which constituted a public war, or such a war as carried with it all the consequences of a public war, existed between the United States, including Connecticut and Illinois, on the one hand, and the organization of states known as the Confederate States, of which Louisiana was one, on the other; that by the laws of war and by the law of nations, as well as by the Act of Congress of the 13th of July 1861, and the proclamation of the President of the 16th of August 1861, issued in pursuance thereof, all commercial intercourse between the inhabitants of the rebel states and those of the loyal states was, during all the period indicated, unlawful, and that all remedies for the recovery of debts were therefore suspended.

To this petition the counsel for the insurance company interposed two objections, one going to the form and the other to the substance of the petition. The first was, that the petition was defective in that it did not affirmatively show that the petitioner was not an inhabitant of some part of the state of Louisiana excepted out of the operation of the President's proclamation of August 16th 1861, prohibiting intercourse as aforesaid. That proclamation declared a state of hostilities to exist, and ordered a suspension of commercial intercourse between the inhabitants of the loyal states and those of the rebel states, except such parts of the latter as maintained a loyal adhesion to the Union, or as were from time to time occupied and controlled by the forces of

the United States. The petitioner, it was said, might have been an inhabitant of some part of the state of Louisiana thus excepted, and so intercourse not in that case being unlawful between him and the citizens of Connecticut and Illinois, he might have interposed his defence within the three years.

This objection was sustained by the court, but leave was given, if the facts would warrant it, to amend the petition so as to obviate the objection.

The second objection was, that in any view of the facts relating to petitioner's residence at the South, the bar of the statute was complete; that the late civil war did not suspend the operation of the statute between the inhabitants of the belligerent sections.

This objection was overruled, the court being of the opinion, upon a full consideration of the authorities, that if the facts were as claimed, the operation of the statute was suspended, and that it created no bar against the petitioner in this case.

An amended petition was thereupon filed, which was supposed to conform to the views of the court, and which averred in general terms that the defendant was, during the period mentioned, an inhabitant of the rebel state of Louisiana, and not of any part of that or any other state excepted by the President from the operation of his said proclamation. As certain parts of the state of Louisiana were, however, amongst the excepted districts, objection was made to this amended petition, that it ought to state precisely and in the affirmative the facts as to the residence or inhabitancy of the defendant, so that the complainant might traverse them and still throw upon the defendant, who could best furnish the proofs, the burden of establishing the issue. This objection was sustained, but leave was again given to amend so as to obviate it. I am now to determine the sufficiency of the petition as thus finally amended to entitle the defendant to come in and answer the bill.

Beside the allegations previously made, the petition contains others to the effect that from the commencement of the war up to March 1st 1862, the petitioner was an inhabitant of the parish of Lafourche, Louisiana, that on that day he entered the Confederate service as an officer, and continued to be an officer until the end of the war; that during all this time he was within the Confederate lines, a belligerent, in the actual service of the Confederate government; that on the 3d of July 1863, he was wounded and

taken a prisoner of war at Vicksburg, and held as such until the 12th of June 1864, when he was exchanged; that while a prisoner of war he was paroled, and by the terms of his parol, was confined to the neighborhood of Thibodeaux in said parish of Lafourche, until the 1st of February 1864, when he was sent to Pascagoula, then within the Confederate lines; that the Federal forces, though not in the actual possession of Thibodeaux when the petitioner arrived there as a prisoner of war, entered that place a few days afterwards, and remained there until he was sent to Pascagoula, as aforesaid. It is also alleged, generally, that from the time of his entering the army on the 1st of March 1862, until the close of the war, the petitioner had no domicile in said parish of Lafourche, and that his family did not reside in said parish from the 1st day of December 1862 until the close of the war.

The material facts, then, are, that from the breaking out of hostilities up to July 3d 1863, when he became a prisoner of war, the petitioner was an inhabitant of a part of the state of Louisiana not excepted from the operation of the President's proclamation of August 16th 1861; and that from the 3d of July 1863 up to February 1864, he was present as a prisoner of war in the parish of Lafourche, in said state, which was then occupied by the Federal forces and was within the Federal lines, after which he was within the rebel lines so long as the war lasted. Precisely when he was in that state, during the period first named, it is true, is not stated, and, so far, the petition is still defective, after so many amendments, but I shall treat it as though what is stated in it negatively were affirmed positively, as I am assured that it is only from inadvertence or from not knowing the importance of accounting for petitioner's inhabitancy during that period, that the allegation failed thus to be made according to the fact.

It is apparent, that in the view of petitioner's counsel, the fact that he bore a military character during the second period indicated, although in the rebel service, makes some difference with his rights in this court.

I shall first assume that he has the same rights as he would have, had he been simply a civilian instead of being a colonel in the rebel army. Under such circumstances, is he entitled to come in and answer, or has he been barred by the statute referred to?

It is clear that he has not been barred, if, first, he was pro-

hibited by the proclamations of the President from all pacific intercourse with the complainant in this case, during the three years following the decree; or if, secondly, by the laws of the United States, had he come to the state of Illinois during the said three years, he could not have effectually appeared to assert his equitable rights in her courts, on account of his previous rebel character.

1. Now there are four proclamations of the President that may be supposed to have a bearing upon the first of these propositions.

The earliest of these was the proclamation of August 16th 1861, issued in pursuance of the Act of Congress of July 13th 1861, interdicting commercial intercourse between the inhabitants of the sections at war with each other, but excepting from the interdict the inhabitants of West Virginia and of such parts of the other Southern States as should from time to time be occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents. In connection with this should be considered the second proclamation modifying it—that of April 2d 1863—the tenor of which was to repeal the exceptions just noticed, on account of the embarrassments created by them in the operations of the government. Now, what was the effect of these proclamations upon the petitioner? Clearly, it was to make it illegal and, therefore, in law impossible for him to hold any pacific intercourse with the complainants from August 16th 1861, up to the time when he became a prisoner of war at Vicksburg, on the 3d of July 1863; because, being a rebel during that period, he was not an inhabitant of a state or part of a state occupied or controlled by the Federal forces, or otherwise within the exceptions in the first proclamation. Again: before the date of his capture by the Federal forces, namely, on the 2d of April 1863, all exceptions made to the operation of that proclamation were repealed, whereby commercial intercourse became absolutely unlawful between the petitioner, being an inhabitant of a rebel state, and the inhabitants of a loyal state, whether he was in a part of a rebel state occupied and controlled by the Federal forces, &c., &c., or not. It follows, that, if the facts are as supposed, these proclamations did not make it legal or possible, but made it illegal and impossible, for the petitioner to appear and defend this case in our courts, at any time during the war. The two remaining proclamations are those known as the Amnesty Pro-

clamations, that of December 8th 1863, and that of March 26th 1864, explaining and qualifying it, containing the scheme of reconstruction devised by President Lincoln. These proclamations promised amnesty and restoration of all rights of property, except as to slavery, or in cases where the interests of third persons would be affected, to all rebels, with certain exceptions, upon their taking the oath prescribed. The excepted classes were, with others, military officers above the rank of colonel, and persons on parole as prisoners of war at the time they should seek to take the oath. Provision was made, however, that persons excluded by these conditions might make special application to the President for clemency, like other criminals. From the 1st day of February, then, when the petitioner ceased to be a prisoner in Federal hands, up to the end of war, it was, apparently, in his power to secure amnesty and restoration of his rights of property, and with them his competence to sue and defend in our courts, by simply quitting the rebel service and taking the amnesty oath; for it is admitted, that his rank in that service at no time was above that of colonel, and even if this were denied, it would still be true, that during the last year and a half of the war, it was in his power to apply for pardon and amnesty; and it was perhaps so far his duty to do so, that if he failed to make the application he could not claim to have been prevented from appearing to defend this cause, so as to avoid the bar of the statute.

2. Admitting, then, that under these proclamations, or some of them, it was lawful, or could have been made lawful, for the petitioner to hold pacific intercourse with the complainant, his creditor, was there any law which would have prevented him from asserting his right to redeem in the courts of Illinois, had he come hither?

I find but one law of Congress that might seem to render nugatory any attempt on his part to enforce here his equity of redemption. It is an act approved July 17th 1862, entitled, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The fifth section of this act is as follows:—

SEC. 5. *And be it further enacted*, That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons hereinafter named in this section, and to apply and use the same

and the proceeds thereof for the support of the army of the United States, that is to say :—

First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the United States.

* * * * *

Sixthly. Of any person who, owning property in any loyal state or territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion ; and all sales, transfers, or conveyances of any such property shall be null and void ; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

It has been held, that this act is binding upon the state, no less than upon the Federal courts: *Norris v. Doniphan*, 3 Am. Law Register (New Series) p. 471, per BULLITT, J., decided in the Kentucky Court of Appeals.

But does the act have the effect to prevent a defendant from interposing his defence in a case like the one at bar ? It doubtless relates to classes of persons among which the petitioner must be reckoned ; persons thereafter acting as officers of the army of the rebels, or who, owning property in a loyal state, should thereafter assist and give aid and comfort to the rebellion. But coming to the important clause, which provides for setting up such a character or conduct as a bar to suits, it is clear that it does not affect the petitioner. It bears only upon cases in which suits should have been brought by rebel officers, or by persons aiding the rebellion, for the possession or use of property belonging to them in loyal states. For our purpose it is sufficient to say, that this suit was not brought by the petitioner, and that, for that reason alone, the statute cannot apply. And if it were contended that, upon the equity of the statute, a complainant ought to be enabled by it to reply to a defence set up by a rebel officer, the answer is, that, by suing such a person, the complainant ought to be held estopped from afterwards setting up that he had no standing in court to defend.

The next question is, does the fact that the petitioner was a rebel colonel, while a prisoner of war within our lines, make any difference as to his rights ?

It is contended by his counsel that if the effect of the laws and proclamations cited was to make it his duty to appear and defend within the three years, his military character and relations excused and prevented him from doing so. The only principles

upon which this could be claimed are, first, that his enlistment and military oath subjected him to a *vis major*, which controlled his actions at and before the time when the decree was entered, and continued to do so down to the end of the war, even while a prisoner, and that, consequently, it was impossible for him to appear in the cause; or, secondly, that, while in the rebel service, he was bound by his military honor not to desert therefrom and come North, although while a prisoner of war in Federal hands it might have been physically possible for him to do so.

As to the first principle, I think there is no force in it whatever. Admitting that a *vis major* compelled his continued service whilst he was within the rebel lines, it ceased so soon as he came into our hands as a prisoner of war. His allegiance had always been due to the government of the United States. So long as he was constrained by overpowering force he could not pay that allegiance to his true sovereign, but when that force was removed he could and ought to do so. Certainly, in the courts of his sovereign, it would be impossible to recognise the constraint of the *vis major* any longer than it in fact existed.

In this respect, perhaps, the rule would be different in a foreign war. A prisoner in our hands in such a war would owe allegiance to the foreign sovereign as much when a captive as before, and doubtless while he remained a prisoner would be as incapable of suing or defending upon a contract entered into before the war as though still in the hostile ranks. Duty would not, as in the case of a rebel in a civil war, require him to renounce his connection with the hostile forces, and to aid those of the government opposed to them, whose prisoner he was.

The second principle rests on the supposed controlling effect of the point of honor. Having once entered the ranks of rebellion, whether under constraint or otherwise, military honor required, it is supposed, that the soldier should continue there for ever. As a question of etiquette this may be conceded to be true. But it is not known that that honor, which is said to obtain among certain classes of petty criminals, has ever been recognised by the courts as furnishing a rule of decision, even between themselves, much less between them and those upon whom their depredations have been committed. The same observation must hold true in regard to the more gentlemanly but more heinous criminals, by whom the peace of our country has for years been disturbed. In

saying this, I do not take it upon myself to punish persons engaged in the rebellion—I am simply affirming that the fact of their having been rebels furnishes no ground for enlarging their rights in our courts. The conclusion, then, is, if, by deserting the rebel ranks and betaking himself to the state of Illinois, the petitioner could have effectually appeared and defended this suit, it was his duty to do so, however ungentlemanly from the rebel point of view such conduct might have been.

There is one consideration, however, adverted to but not pressed by counsel on the argument, which in my judgment is decisive of the case in petitioner's favor, whatever may be thought of those already presented.

At the time the bill in this case was filed, a state of war existed between the inhabitants of the rebel states, including the petitioner, and the inhabitants of the loyal states, including the complainant. That this war was a civil war, makes no difference in its bearings upon this cause. It is enough that it was recognised by the Federal authorities, including the highest court in the land, as a war, of which they claimed for the United States and accorded to the rebels, the rights as determined by writers on public law. It has long been a settled maxim, that the existence of the hostile relation suspends all pacific intercourse between the respective belligerents: *Griswold v. Waddington*, 16 Johns. R. 438. All contracts entered into, during the existence of a war, are, with a few exceptions relating to the ransom or maintenance of prisoners of war, absolutely void. The reason of this is, first, that by buying from, or selling to, an enemy, I may directly or indirectly enhance his ability to continue the war; and secondly, and chiefly, that the intercourse necessary to the consummation of contracts with an enemy would furnish facilities for traitorous correspondence with little chance of detection: *The Julia*, 8 Cranch 192. This danger is so great, that all intercourse whatever, except that of mutual destruction under the guidance of the public authorities, is interdicted. As a consequence, contracts entered into before the war are absolutely suspended whilst the war continues, not so much because the enemy might have his means of supporting the war increased by allowing them to be enforced, for the benefit might accrue equally to both belligerents, as because the intercourse necessary to enforce them or to fulfil them is inconsistent with the state of war, which is one of mutual

hostility between every man of the one, and every man of the other, belligerent. And though it be certain, in any particular case, that no harm can result from the intercourse, the rule is the same. Thus, a citizen of one country cannot draw bills upon a citizen of another country at war with his own, for the purpose of appropriating funds deposited with him to the use of another enemy, not even for the purpose of withdrawing the funds for his own use: *Hoare v. Allen*, 2 Dallas 102; *Griswold v Waddington*, 16 Johns. 438, 481-84; *Willison v. Patterson*, 7 Taunton 438; *Conn v. Penn*, 1 Peters 496. On the same principle, it is unlawful for the owner of property in a foreign country at the time war breaks out between it and that of the owner, to withdraw it, unless it be done immediately after war is declared. Otherwise, if taken by the cruisers of the owner's country, it would be liable to condemnation as prize: *The Rapid*, 1 Gallison 295; same case on appeal, 8 Cranch 155; *The William Bagalay*, 5 Wallace 377. And in one case, where certain British merchants had debts owing to them from French merchants, residing in Guadeloupe, which had been contracted prior to the war, and certain sugars had been received by the agent of the creditors from the debtors, as payment of those debts, and shipped to his principals, it was held, that such a remittance was unlawful, and the ground of the decision was, that the allowing of a commerce with the enemy, under such circumstances, without a license, would be opening the door to treasonable communications: the case of *The William*, cited by KENT, Ch., in *Griswold v. Waddington*, 16 Johns. 460. From this it doubtless follows that the slight intercourse necessary to enable a creditor to receive payment of his debt from his debtor enemy would be unlawful. As Chancellor KENT observed in the case just cited, "the idea that any remission of money may be lawfully made to an enemy is repugnant to the very rights of war." And to make it certain that he regarded it equally unlawful to receive money from an enemy as to pay it, he added: "repugnant to the very rights of war, which require the subjects of one country to seize the effects of the subjects of the other." Id. 482. In a state of war, although every man of each nation is an enemy, still it is the war of the nations and not of the individuals, and hence when individuals seize the property of their enemies, as their duty requires, they seize it for national, and not for individual use; they seize it, not

to appropriate it to the payment of debts due them from the owners, but to preserve it for confiscation, that is, for condemnation to the *fisc*, or public treasury.

These positions are clearly deducible from the authorities. If the question were, then, whether, pending the late war, it would have been lawful for a creditor residing here to receive payment of his debt, in money or in goods, from his debtor enemy residing in the Confederacy, the answer would very clearly be, that it would not have been lawful. But admitting this, does it follow, that, during a war, contracts made before the war are so far suspended as to forbid a proceeding to enforce them *in rem*, when the *res* lies at the creditor's hand? I find no direct authority upon the question, but I am satisfied the suspension is complete for all purposes, while the hostile relation subsists.

In the first place, proceedings *in rem* never are, or can be allowed to ripen into a judgment without some sort of notice, either published in the journals or sent to the owner alleged to be indebted, by the person claiming to be his creditor. When a state of war exists, is it not a violation of the creditor's allegiance to attempt to communicate with an enemy, for a private purpose, in either of the modes indicated? What right has he to despatch to his debtor a missive relating to his private business, or to address to him a communication through the public prints? Intercourse of that kind would be liable to all the abuses apprehended from those commercial transactions which are interdicted by law. It is, in my judgment, therefore, within both the reason and the letter of the prohibition against intercourse with a public enemy. If it be said, that when a notice is published in a newspaper, it is unnecessary, and that it is not intended that it should come to the debtor's knowledge; that the principal object of it is to give the court jurisdiction, and that this is given, equally, when the notice has been seen by the debtor in fact and when it has not; the answer is, that the court must presume either that the debtor has seen it or that he has not. If it presumes that he has seen it, knowing his relation, it is bound to note the impropriety of the intercourse by which it was brought to his knowledge, and to refuse to sanction it. If it presumes that he has not seen it, because his relations to the plaintiff are such that it could not reach him, then it should decline to assert a jurisdiction which could only operate as a fraud. For it is not true, that the only

object of a published notice is to give jurisdiction; it is also designed to apprise the debtor that legal proceedings have been commenced, to enable him to appear and make defence, if he choose. Without the latter condition, indeed, the proceedings would be, *jure gentium*, invalid. When, in the suit to foreclose the mortgage in this case, then, the notice was published in a newspaper, directed to the petitioner, informing him that, as he had failed to pay his bond, a bill had been filed to foreclose the mortgage, was it expected by the complainant that the petitioner would receive the notice, or was it believed that he could not receive it, or act upon it if he did receive it? In either event, equally, the publication of the notice was illegal, and might have been punished as an act of unlawful intercourse with a public enemy. Upon such an act no court could found a rightful jurisdiction to proceed to render judgment. If it was believed that the petitioner would or might receive the notice, but that he would be unable to appear to defend the suit, or to protect his interests at the sale, because he sustained the relation of an enemy; or, if it was expected, that he would not, because it was known that he could not receive it, the taking of the decree was a fraud upon him and upon the court. The only principle upon which it could be justified would be, that the debtor being an enemy, had no rights which a court of justice was bound to respect. If the mere publication of a notice in a newspaper could be made the ground of jurisdiction against an enemy's property, under the circumstances supposed, why might it not also against the estate of an infant *in utero*, or against the property of a dead man? Titles thus acquired would rest upon a basis of robbery, not upon a judicial divestiture of the debtor's interest, recognised as just *jure gentium*. Nor could such transfers be sustained as acts of confiscation, since whenever that most odious right of war is exercised, it is done for the benefit, not of individuals, but of the public.

For these reasons I am of the opinion that, if it be true, as alleged in the petition, that in 1862, when the bill in this case was filed, the petitioner was an inhabitant of a country standing in a hostile relation to that of which the complainant was an inhabitant, the contract of mortgage was suspended, and that the proceeding to foreclose it was unauthorized *ab initio*. From this it follows, that had the petitioner sued out a writ of error in

proper time, the decree must have been reversed and the bill dismissed. An order will, therefore, be entered permitting the petitioner further to amend his petition according to the facts as indicated above, within one week, and ten days thereafter to file an answer to the bill, upon payment of all the costs ; unless the complainant, in the meantime, shall have taken issue upon the material facts stated in the petition.

United States District Court, District of New Jersey.

IN THE MATTER OF ISAAC ROSENFELD, A BANKRUPT.

The creation of a debt by fraud is not a ground for refusing a discharge to a bankrupt.

A specification stating that debt had been created by fraud is not a good specification, and will be stricken out on motion.

A bankrupt cannot be examined for the purpose of showing that the debt was created by fraud.

A fraudulent conveyance made, or a fraudulent preference given, before the passage of the Bankrupt Act, are neither of them good grounds upon which to oppose a discharge. Such a conveyance or preference does not come within the terms of section 29 of said act, and a specification alleging such a conveyance or preference will be stricken out on motion.

The difference explained between the meaning of the following phrases in section 29, viz. : "*Since* the passage of this act," and "*subsequently* to the passage of this act."

By the term "fraudulent preference," used in item nine of section 29, is meant only a preference in fraud of the Bankrupt Act, that is, contrary to its provisions.

APPLICATION for discharge of bankrupt.

Abbett & Fuller, for the bankrupt.

McCarter & Goepp, for creditors.

FIELD, J.—There are two questions, the determination of which will dispose of all the exceptions taken to the specifications filed in this case.

1. Is the creation of a debt by fraud, a good ground upon which to oppose the discharge of a bankrupt ?

The 38d section of the act provides : "That no debt created by the fraud of the bankrupt, shall be discharged under this act ; but the debt may be proved, and the dividend thereon shall be a

payment on account of said debt." Why, then, should a creditor be allowed to object to the discharge of a bankrupt, on the ground that the debt due to him was created by fraud? So far as he is concerned, the bankrupt is not discharged at all. He is in fact a favored creditor; like other creditors, he is entitled to receive a dividend; but this dividend, instead of being a payment in full, is only a payment on account, and the bankrupt is for ever liable for the balance of the debt; and this balance is much more likely to be paid, if the bankrupt is discharged from the payment of all his other debts, than if he was not discharged at all. Such a creditor, therefore, has not only no right to oppose the discharge, but it is not his interest to do so. This, no doubt, is the reason why the fact that the debt was created by fraud, is not, by the 29th section, made a ground for refusing a discharge.

If the question, therefore, had not before arisen, I should have had little or no doubt with regard to it. But it is not a new question. It has been before Judge BLATCHFORD, in the Southern District of New York, upon two occasions; once in *Rathbone's Case*, Weekly Bankrupt Register, March 2d 1868, p. 65; and again in the case of *Darius Talman*, Weekly Bankrupt Register, April 20th 1868, p. 122. In the first case, he held, that a specification, stating that the debt had been created by fraud, was not a good specification; and in the second, that a register was right in refusing to allow a bankrupt to be examined for the purpose of showing that the debt was created by fraud. I concur with him entirely in opinion.

2. The second question is one about which there is, I will not say more doubt, but perhaps more room for discussion; and as the counsel for the creditors have urged their views with so much force and earnestness, I have felt bound to give them a very careful consideration. Is a fraudulent conveyance made before the passage of the Bankrupt Act, a good ground upon which to oppose a discharge?

The 29th section contains an enumeration of seventeen distinct acts, any one of which, if shown to have been committed by the bankrupt, is an absolute bar to his discharge. These acts are in the nature of offences, created and defined by the bankrupt law, the penalty for the commission of which by the bankrupt, is the forfeiture of his right to a discharge. Now, suppose there was

no limitation whatever in the law itself, as to the time within which these acts must have taken place or been performed ; would it not have been necessary to aver and prove, that they had been committed since the passage of the law, in order to deprive the bankrupt of his right to a discharge ? To have held that acts committed before its passage were offences against the bankrupt law, would have been to make that law, if not an *ex post facto* law, in the strict sense of the term, yet at least a law, retroactive or retrospective in its character. Now, although to give a law a retrospective operation, may not render it absolutely unconstitutional, yet as a general rule, it is a very objectionable feature in any law ; and an intention upon the part of the legislature to give a law such a character, will never be presumed, in the absence of express words to that effect.

But it is said, there is a limitation as to time expressly annexed to some of the acts enumerated in the 29th section, that limitation being expressed by the words, "since the passage of this act," and as this limitation is not annexed to other acts, therefore, upon the principle "*expressio unius est exclusio alterius*," it is to be presumed that with regard to these other acts, it is sufficient to show that they were committed at any time, whether before or since the passage of the law. If all the provisions of the section are, upon general principles, subject to the restriction that the acts must have been done after the passage of the law, why in express terms impose that restriction on two only out of the seventeen ?

But from a closer examination of the whole section, I think it will appear, that the maxim alluded to has no application in reference to it. To the first four items, no limitation as to time is annexed ; but then they are acts which could only be committed after proceedings in bankruptcy had been commenced. The fifth item has a limitation, expressed by the words, "within four months before the commencement of such proceedings." But this limitation of four months was meant to be confined to the fifth item alone. It became necessary, therefore, to annex to the following items a different limitation. The sixth item, accordingly, begins with these words, "or if since the passage of this act." Now, if it was intended that this limitation should apply to all the following items, from the sixth to the fourteenth, it certainly was not

necessary to repeat it at the beginning of each clause. The 39th section, which contains an enumeration of what are deemed acts of bankruptcy, has the same limitation as to time, expressed by the words, "after the passage of this act," annexed to the first act described; and there can be no doubt that it is meant to extend to all the other acts therein enumerated; but it was not thought necessary to repeat it at the beginning of each subsequent clause.

But it is said the fourteenth item of the 29th section has a limitation expressly annexed to it, substantially the same as that annexed to the sixth item; and if the limitation contained in the sixth item extends to all the intervening items without being repeated, why would it not also have extended to the fourteenth item. The fact that the very same limitation as that contained in the sixth item, is expressly annexed to the fourteenth, shows that it was not intended to apply to the intervening items.

But it will be perceived that the language in which the limitation is expressed in the fourteenth item, is slightly different from that used in the sixth. Instead of being "*since* the passage of this act," it is "*subsequently* to the passage of this act." Now, let us see if we cannot account for this difference in phraseology, and thus explain why it was deemed necessary to repeat the limitation in the fourteenth item, slightly varied in form. The change consists in substituting "*subsequently*" for "*since*." These words, although similar in meaning, are not identical. "*Since*," according to Worcester, means "from the time of;" and its meaning is illustrated by a line from Milton:—

"He since the morning hour set out from Heaven."

And Webster, in his dictionary, says, "The proper signification of *since* is after, and its appropriate sense includes the *whole period* between an event and the present time. I have not seen my brother since January." "*Subsequently*," according to the same authorities, means "at a later time," or, "afterwards," that is, at any time afterwards.

Now, the act described in the fourteenth item is that of a merchant or tradesman, not keeping proper books of account. If the limitation had been expressed by the words, "*since* the passage of this act," it might have been said, that to bring a

merchant or tradesman within its provisions, he must, *during the whole period* from the passage of the act, have neglected to keep proper books of account. Whereas, by using the word "subsequently" it would be sufficient to show that he had, at any time after the passage of the act, neglected to keep proper books of account. And this, no doubt, is what was intended by the provision. We see, therefore, why it was, that in the fourteenth item it was thought necessary to repeat the limitation annexed to the sixth item, but to express it in a somewhat different form. The fact, then, of such repetition in the fourteenth item, does not prove that the limitation annexed to the sixth item was not meant to extend to all the intervening sections.

But let us see what would be the result of the construction contended for by the counsel for the creditors.

The act described in the sixth item, to which the limitation as to time is expressly annexed, is the act of destroying, mutilating, altering, or falsifying, books, documents, papers, writing, or securities. This is certainly one of the grossest frauds that could possibly be committed by a bankrupt, and if this must be committed since the passage of the act, in order to make it a ground upon which to refuse a discharge, it would be difficult to imagine upon what possible principle the same limitation was not extended to the acts described in the following items. A construction involving such a result certainly cannot be the true construction. At all events, it ought not to be adopted unless it is imperatively required by the language of the act.

But again, by the construction contended for, if there is no limitation as to time with regard to the tenth item, there is none with regard to the ninth. The act described in the ninth item is, a "fraudulent preference contrary to the provisions of this act." Now, could it have been intended, that the mere fact of a bankrupt having at any time before the passing of the act given a preference to one or more of his creditors, would be a good ground upon which to oppose his discharge. By the term "fraudulent preference," of course, is meant only, a preference in fraud of the Bankrupt Act: that is, contrary to its provisions. But in New Jersey, at least, before the passage of the Bankrupt Act, a debtor had a perfect right to prefer one creditor to another. This has been repeatedly decided by the Supreme Court of the

state: *Hendricks v. Mount*, 2 South. 788; *Tillon v. Britton*, 4 Halst. 120. Nay, it has been held, that it was the duty of the debtor, under certain circumstances, to prefer one creditor to another. It cannot be imagined for one moment, that the framers of the law meant that an act committed before its passage, and which was perfectly lawful at the time it was done, would be a ground upon which to refuse a bankrupt his discharge.

Upon the whole, then, I am clearly of the opinion that either the limitation as to time annexed to the sixth item was intended to apply to all the intervening items between that and the fourteenth or that these intervening items, having no limitation as to time annexed to them, must be construed in reference to the principle applicable to laws generally, which is, that they take effect only from the time of the passage.

This is the view taken of the 39th section by those who have written upon the Bankrupt Act. James, after speaking of the fifth item, says: "Next follows a series of misconduct or offences, which, to affect the bankrupt's order of discharge, must have been committed by him since the passage of the act:" James' Bankrupt Law 129. See also Bankrupt Law by Avery & Hobbs 214, 220.

This also would seem to be the view taken by Judge BLATCHFORD, in *Rathbone's Case*, before referred to. One of the specifications was, fraud in an assignment made in 1854. It was objected to as being too vague. The objection was sustained, and leave granted to file new specifications. The specifications were then made more full and particular, and when the matter came up again, the judge said: "The 2d and 3d specifications relate solely to transactions by the bankrupt under and in regard to an assignment made by him in 1854. They do not set forth any ground that is covered by section 29 of the act."

All the exceptions taken to the specifications filed in this case are, therefore, sustained.

United States District Court—Eastern District of Pennsylvania.

ESTATE OF BENJAMIN F. APPOLD, AN INVOLUNTARY BANKRUPT.

So far as conformity in the procedure under executions out of the Federal courts, and out of the courts of the respective states, had been attained under the Act of Congress of 12th May 1828, and the rules of practice in the Federal courts, which, under the authority conferred by that act, had, from time to time, been adopted before the present bankrupt law was passed—the constitutional requirement that the system of bankruptcy should be uniform throughout the United States has been fulfilled if the bankrupt law operates uniformly upon whatever would have been liable to execution if no such law had been passed, though the subjects of its operation may not be in all respects the same in every one of the states.

Quære, Whether under the present bankrupt law of the United States, goods of the estate in the hands of the assignee are distrainable for rent?

If they are not, it is because they are not less in legal custody than goods taken in execution; and under the equity of any laws of the respective states which, like the English statute 8 Ann. c. 14, entitle a landlord to payment of rent accrued, not exceeding one year's, out of the proceeds of goods sold under an execution, the landlord, who is prevented from distraining may demand such an amount of rent from the assignee in bankruptcy.

Such a rule of decision is not inconsistent with apparently contrary decisions under the English system of bankruptcy.

Though rent, as such, may not accrue during the proceedings in bankruptcy, an equal charge for storage may, for a certain period, under certain circumstances, be incurred by the assignee.

THE room in which the bankrupt had conducted his business of a grocer was leased to him at \$62.50 per quarter. On January 24th 1868, the day appointed by the assignee for the sale of the goods of the estate on the premises, a bailiff of the landlord appeared, and by virtue of a warrant from him, distrained the goods for \$125, due for two quarters' rent. The bailiff did not sell the property, but it was agreed by and between the principal and the assignee, that the latter should make the sale and that the proceeds "in his hands should remain subject to the claim of the landlord just as the goods then were." The assignee made the sale and received the proceeds. In his account, as audited before the register, immediately following the statement of the balance for distribution, was a memorandum, that this balance was subject to such rights as the landlord of the bankrupt might have obtained by virtue of the levy made by his bailiff, and of the agreement made as above by the assignee. The questions presented were, 1st. Is the landlord entitled to take out of the

balance in the hands of the assignee the sum of \$125 due to him by the bankrupt for rent? and 2d. Has the register authority to direct or sanction the payment of this sum to the landlord by the assignee out of the balance in his hands as shown by the account. These questions were certified by the register to the court.

CADWALADER, J.—Under the present system of bankruptcy in the United States the estate in the hands of the assignee is more determinately in legal custody than under the English system. There is, therefore, I think, reason to doubt the applicability of the English decisions that a landlord's right to distrain continues after an assignment under the bankruptcy of his tenant.¹ But if these authorities are inapplicable, it does not follow that the so-called lien of a landlord for rent should be wholly disallowed. The proceedings in bankruptcy may then have the effect of a statutory execution so that the case of the bankrupt's landlord may be within the equity of any laws of the respective states which entitle a landlord to payment out of the proceeds of goods taken in execution. The Pennsylvania statute, following the English Act of 8 Ann. ch. 14, entitles him thus to receive an

¹ In a case of involuntary bankruptcy there certainly can be no distress while the estate is in custody of the marshal as messenger; and the assignee succeeds to this custody.

In the case of *The Estate of Samuel C. Brown*, an involuntary bankrupt (21st October 1867), this court was of opinion that rent might be paid by the assignees on the same footing as under an execution, and that an equal amount as accruing storage might be paid in addition so long as the assignees should necessarily occupy the premises.

In a previous case of *The Estate of Jeremiah M. Gale*, also an involuntary bankrupt, the landlord of the bankrupt commenced summary proceedings before an alderman to recover possession of the demised premises under the Pennsylvania statute of 25th March 1825. Upon the petition of the assignee showing that his dispossession would be injurious to the interests of the creditors, he was, on the 19th August 1867, authorized by this court to pay the rent, or if not in funds, to give security under the Pennsylvania statute. In this case it was desirable that the lease, fixtures, and good will should be sold with the late stock in trade of the bankrupt.

In a case of *Schell, Berger & Co.*, voluntary bankrupts, a provisional receiver had been appointed after the adjudication of bankruptcy and before the first meeting of creditors. He was afterwards elected assignee. But before he thus became assignee, an order upon him as receiver to pay rent was made, on 16th March 1868, upon the landlord's petition, showing that funds were in hand which ought to be thus applied. The receiver certified that in his belief the landlord's claim was correct.

amount not exceeding a year's rent. Blackstone's opinion, 2 Com. 487, that the landlord was thus entitled to the benefit of the analogy of the Statute of 8 Ann. where he omitted to distrain, has been overruled in England only because the goods late of the bankrupt on the demised premises are distrainable in England notwithstanding the assignment in bankruptcy. Otherwise the case would be within the equity of the statute. This conclusion may be reached without any necessity for considering the rent as a lien properly so called.

Under the Maryland Insolvent Law it has been decided that the property of an applicant for the benefit of that act is in the custody of the law and cannot be distrained, and also that, without a previous distress, the landlord has no recourse against the estate. The latter part of this decision depends upon the local statute law. The Statute 8 Ann., it is true, is in force in that state; but certain state laws are cited as controlling the decision there: 10 Md. 156.

Where the landlord makes a demand upon the assignee before the removal of the goods for an amount not exceeding a year's rent, it should, I think, if unpaid, be admitted as entitled to priority of payment whether the right of distraining exists or not. Where more than a year's rent is demanded, the question of the existence of the right of distraining will arise. At present I intimate no opinion upon this point. The claim is allowed under the alternative view of the law which I have explained.

In cases in which assignees in good faith keep the stock in trade of a bankrupt in his former place of business for the purpose of either economical storage or advantageous disposal, if there is no improper delay, the hire of the landlord's premises may often be fairly valued by the standard of the former rent. In such cases I have not hesitated to allow him an amount equal to accruing rent. The cost of storage elsewhere would equitably be considered a lien.

The first question of the register is, therefore, answered affirmatively. The landlord's claim is allowed, but without any costs of a distress.

Upon the second question I am of opinion that the register, if the assignee had paid the amount, would have been warranted in allowing him credit for it in the audit of the account under the 27th section of the Act of Congress, at the second meeting of

creditors. The allowance, as any other one, would then, of course, have been subject to exception. But I am of opinion that a prospective payment could not have been regularly sanctioned by the register unless there had been a special reference of the question to him by the court. Even then his allowance would have been subject to exception. In all cases, however, he may refer any such question incidentally to the court, as he has done in this instance.

I understand that the questions here certified have arisen at a second meeting of creditors. The sum of \$125 will be deducted by the register from the net amount in the hands of the assignee after all proper charges have been allowed. The register's own account will be settled with the assignee, and the excess or deficiency of the deposit of \$50 accounted for between them. The net amount will be reported for a dividend, after which the distribution of it will be reported according to form No. 32, appended to the general order of the Supreme Court.

The remarks in the last paragraph are made in answer to inquiries by the register in a letter to the clerk.

Recurring to the main point in question it may be added that the Bankrupt Law of 1867, does not, in general, vest in the assignee any more beneficial interest in the debtor's estate than his execution-creditors could, under the laws of the respective states already in force have obtained under adversary proceedings. General conformity of procedure in this respect in the Federal courts, and in those of the several states, had been previously attained through the Act of Congress of 19th May 1828 (4 St. U. S. 281), and the rules and practice of the Federal courts adopted from time to time, under the authority conferred by this act. The system of bankruptcy is, in a relative sense, uniform throughout the United States when it operates uniformly upon whatever would thus have been available to the recourse of execution-creditors if the bankrupt law had not been enacted. My views to this effect have been explained in a former opinion. The assignee in bankruptcy will, in the present case, obtain what would have been obtainable for the benefit of an execution-creditor under the law of Pennsylvania. That less or more may perhaps be obtainable in another state does not prevent the operation of the bankrupt law from being, in a constitutional sense, uniform.

Superior Court of Cincinnati.

CHARLES K. BAKER v. THE CENTRAL INSURANCE COMPANY.

When a steamer is insured, while navigating the Western rivers, against the usual risks, there is a warranty implied that the subject insured is a vessel of this description, and will continue to be so during the existence of the policy.

If the owners subsequently transfer the machinery and wheels of the boat they insured to another vessel, with the intention to abandon the hull for all purposes of navigation, the hull is no longer at the risk of the underwriter.

Lincoln, Smith & Warnock, for plaintiff in error.

Tilden, Stevenson & Tilden, for defendants.

The opinion of the court was delivered by

STORER, J.—The plaintiff was insured by the defendants on five-sixteenths of the steamer *Sioux City*, valued at \$5000, against the perils of the river or fire, by a policy issued on the 6th of March 1865, the risk to continue until March 12th 1866. Permission was given to navigate the Ohio and Mississippi rivers and their tributaries, excepting the Arkansas and Red rivers, and the premium agreed on was paid, or secured to be paid.

When the risk was taken it is admitted the boat was engaged in navigating the Western waters, but it is alleged she was lost on the 16th of December 1865, while lying at St. Louis; being then crushed and afterwards sunk by the ice.

This action was brought by the assured for the loss, and the case submitted to one of the Judges in Special Term, upon the pleadings and evidence. The defendants, in their answer, admitted the loss of the boat, and the contract of insurance, but denied their liability, upon the facts which are more fully stated in the testimony.

It appears that while the boat was at the wharf, in the early part of November, her machinery, boilers, and wheels were taken off and placed upon another hull owned by the insured, to which they are permanently adjusted. They were, as the plaintiff testified, "transferred to the steamer *Admiral* to supply her with an outfit, as the owners of the *Sioux City* had deemed it desirable to build a lighter draught boat, more suitable to the trade, and transfer her machinery and outfit into it; disposing of the hull and cabin of the *Sioux City* on the best terms they could."

With this evidence before him, the Judge decided that, under the terms of the policy, the plaintiff could not recover. He held that the description of the vessel, "the steamer Sioux City," was a warranty that she was properly equipped and provided with machinery, at the time the risk was taken, which warranty, in legal contemplation, continued until the time had expired for which the policy was issued; that when the machinery and wheels were transferred to another boat, and had become part of her outfit, the original hull to which they had been attached, having been virtually abandoned, the contract of insurance was at an end.

To this ruling the plaintiff excepted, and having filed his petition in error, now asks that the judgment in Special Term be reversed.

The question before us may be resolved into a single proposition, and that is this: Do the words "steamer Sioux City," the vessel then navigating the Western waters, import an express warranty that she then is, and will continue to be until the time of loss, a steamer or a craft propelled by steam?

There can be no just criticism on the words of description used in the policy to change their ordinary signification; they cannot be said to convey a different meaning than the term "steamboat," although until the last twenty years that name was universally given to such vessels. No particular form of words, we suppose, is required to constitute an express warranty; but it is admitted that it is necessary they should be inserted in the body of the policy, and must be such as clearly to indicate the intention of the parties: 1 Arnould § 379.

In 1 Condry's Marshall 314, it is said that "not only the name, but also the species of the vessel ought truly to be described; for although the word ship, in its general signification, comprehends every different species of vessel, both great and small, which navigate the seas, yet in a policy of insurance the word ship is used in contradistinction to other vessels, and means a vessel with three masts, and generally of large dimensions; and in such case an underwriter would have a right to say he understood the policy to be on a ship, and that he could not have assured a sloop or brig." (See also Meredith's Emerigon, ch. 2, § 7; ch. 6, § 8.)

The definition of a warranty in a policy of insurance given eighty years ago by Lord MANSFIELD, in *De Hahn v. Hartly*, 1 T. R. 345, has been followed by Park, Marshall, Arnould,

Phillips, Parsons, and Duer, and is admitted to be the undisputed law.

His lordship decided "that a warranty in such an instrument was a condition or a contingency, and unless that be performed there is no contract." "It is perfectly immaterial," he says, "for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied with." "It is in the nature of a condition precedent; either affirmative, as where the insured undertakes for the truth of some positive allegation; or promissory, when the insured undertakes to perform some executory stipulation:" 1 Marshall on Insurance 347.

"Whenever, then, the warranty exists, whether the thing to be done is essential to the security of the ship or not, or whether the loss happens or does not happen on account of the breach of the warranty, still the insured has no remedy. He has not performed his part of the contract, and if he did not mean to perform it he ought not to have bound himself by such a condition:" Park on Insurance 318. "Express warranties include those stipulations which, by the agreement of the parties, are introduced into the policy; as that the property is neutral; that the vessel has a certain national character—English, French, or American; that she is, if in time of war, to sail with convoy; that she has an armament of a certain number of guns, or is manned by so many seamen. In all these cases the contract must be literally fulfilled, for it is said the very meaning of a warranty is to preclude all question whether it has been substantially complied with or not; if it is affirmative, it must be literally true; if promissory, it must be strictly performed:" 1 Marshall 348. We find no limitation to the rule thus stated, in any reported case in our courts, whether Federal or state, nor in any American writer on the subject of insurance.

It is claimed by the plaintiff, if the terms used in the policy may be regarded as an express warranty, that it is not a continuing stipulation that, at the time of loss, the vessel must be the same she was represented to be when the risk was taken. Indeed, it is said by counsel, that, while any portion of the subject insured remains, it is still covered.

If this was true, the machinery would still be insured if the vessel was abandoned or broken up; for, if the mere hull and cabin are covered, notwithstanding, for all the purpose of naviga-

tion, the steamer no longer exists; there can be no good reason why her propelling power—her wheels and other appurtenances—would not come under the same rule.

But this view of the contract we are satisfied cannot be sustained on any legal principle; for whenever the description of the subject insured no longer existed, there must necessarily be an end to the contract.

The risk was taken originally, not upon the hull of a vessel, but upon the vessel fitted out, let it be a ship or a steamboat; and whenever either ceases to retain the specific character, either by the removal of the masts, rigging, sails, and furniture of the one, or the machinery of the other, the policy cannot longer be said to attach; if it did, the underwriter would be bound by a risk to which he never gave his assent. He might be willing to insure the contemplated vessel ready for navigation, when he would not have given a policy on the hull, and, as he might have refused such a risk in the first instance, he ought not, when the original character of the thing insured is entirely changed, to be charged with a liability he never contemplated, or could reasonably be supposed to have assumed.

It was well remarked by Lord ELDON, in the *Newcastle Fire Insurance Company v. Macnamara et al.*, 3 Dow 362-365, "that if there is a warranty, it is part of the contract that the matter is such as it is represented to be.

"Therefore, the materiality or immateriality signifies nothing; the only question is—what is the building *de facto* I have insured?"

In *Sellim et al. v. Thornton*, 3 Ellis & Black. 868, reported also in 26 E. L. & Eq. 238, Lord CAMPBELL held, "that when a two-story brick building, described in the policy as used for a dwelling-house and store, was insured for a year, it amounted to a warranty that the insured would not do anything to make the condition of the premises vary from the description; and if, during the risk, the insured added another story, and the property was afterwards burned, there was a breach of the warranty by the addition to the premises, and the underwriters were discharged."

"The description," said his lordship, "is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he will agree to take the risk at all, and if he does take it, what premium he shall demand.

"With respect to maritime policies, if there is a warranty of neutrality, or any other matter which continues of importance till the risk determines, whether the policy be for a voyage or for a time certain, such warranty is continuous; and if broken, the underwriter is released." See also *Taylor v. N. W. Ins. Co.*, 2 Curtis C. C. U. S. 612; *Calvert v. Ham. Mut. Ins. Co.*, 1 Allen 308; *Fowler v. Aetna Ins. Co.*, 6 Cowen 673; *Wood, &c., v. Hartford Fire Ins. Co.*, 13 Conn. 544; *Sheldon v. Hartford Fire Ins. Co.*, 21 Conn. 19.

We do not deny that in case of accident, or when a vessel is in port for repairs, the machinery, in whole or in part, may be removed from the vessel for that purpose, to be replaced within a reasonable time. This was settled in *Polly v. Royal Exchange Co.*, 1 Burr. 841, and this exception to the general rule may well be said to prove its existence.

We have been referred by counsel to various cases which he claims furnish analogies by which we may fairly construe the contract between the parties to include the loss of the hull by ice, but we find none of them to deny the principle upon which the law of warranty is founded; but, on the contrary, sustain the view we have taken. They are quoted, we suppose, to prove that in a proper case we may look to the fact whether the omission to do an act that might have been done, has produced the loss; but it is very clear that whatever may be the rule where a representation only has been made, the increase or diminution of the risk has nothing to do with an express warranty; in the latter case, *ita scripta est* determines the rights of the parties. We would remind counsel that the case cited of *Hood v. Manhattan Insurance Co.*, 2 Duer 181, was some years since reversed by a unanimous decision of the Court of Appeals, 1 Kernan 532.

We conclude the defendants are not liable on this policy to indemnify the plaintiff for the loss of the hull and cabin of his boat. The whole testimony proves the subject insured no longer existed when a material part had been taken away; and the opinion of the witness as to what constituted a steamboat, or what efforts were made to prevent the accident, cannot be regarded as affecting the settled law of insurance. Their opinions are as various as the cases in which they are presented, and are effectually disposed of by the ruling of our Supreme Court, in *Hartford Protection Insurance Co. v. Harmer*, 2 Ohio State Reports

452 ; nor do we think, because a vessel described as a steamboat in the process of building, while yet on the stocks, and known as such to both the insurers and insured, may be covered by a policy when such a description is used, that any such construction can be permitted when the vessel is already navigating our rivers by steam.

It would seem to be a singular coincidence that the steamer - Admiral, to which the machinery and appurtenances taken from the Sioux City were removed, was lost by the ice at the same time the remains of the latter vessel were destroyed.

There cannot be, nor is there claimed to be, any pretence to recover for the loss of that machinery, though it was once covered by the policy ; and a like rule should be applied to the loss of the hull.

The plaintiff has been unfortunate, but his remedy against the defendant was gone when his vessel ceased to be a steamer. There is a clause in the policy by which it is covenanted that the steamer should, during the continuance of the risk, be sufficiently "found in tackle and appurtenances." This was urged by the counsel of defendants in his argument, but we suppose it is but the statement of what the law would require without any express stipulation.

It was the necessary result of the express warranty that the vessel was a steamboat.

On the whole case we find no error in the judgment of the Court at Special Term, and it is therefore affirmed.

FOX and TAFT, JJ., concurred.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.¹

SUPREME COURT OF VERMONT.²

AGENT.

Book Account.—It is the duty of an agent, when the nature of the business of his agency requires it, to keep an accurate account of his payments and disbursements, and to render at all proper times an

¹ From Hon. O. L. Barbour, Reporter ; to appear in Vol. 50 of his Reports.

² From W. G. Veazey, Esq., Reporter ; to appear in 40 Vt. Rep.

account thereof to his principal "without concealment, suppression, or overcharge:" *Gallup v. Merrill*, 40 Vt.

The neglect of an agent to render a specific and accurate account to his principal when required, is not a bar to an action in favor of the agent to recover a balance due him from his principal, but, as a matter of evidence, it raises a presumption against his claim: *Id.*

ATTORNEY.

Service upon.—As a general rule, when an attorney is employed, all papers in the cause must be served upon him, instead of the party. The only exception to this rule is where the object is to bring the party into contempt: *Flynn v. Bailey*, 50 Barb.

Where an order required that if the defendant refused to refund certain moneys within twenty days after service of a copy, a judgment should be set aside and vacated, but did not require a personal service upon the defendant: *Held*, that a service upon his attorney was sufficient: *Id.*

BILLS AND NOTES.

Revenue Stamp—Original Consideration.—In an action of general *assumpsit*, the payee of a promissory note, having no revenue stamp affixed thereto, and if, for that reason, invalid, can recover of the maker upon the original consideration for which such note was given: *Wilson v. Carey*, 40 Vt.

Trover—Evidence.—The defendant purchased the note in question of his daughter, who told him that B., to whom she was betrothed, and who was a soldier in the army, gave it to her. He had also seen a receipt in her possession, signed by her, stating that she had received the note of B., and was to account for it on demand, and a promise to pay him or bearer. At B.'s death this receipt was found in the hands of S., who was a depository of B.'s papers. *Held*, that this knowledge of the receipt was not alone sufficient to put the defendant on inquiry in respect to his daughter's title to the note, but he was a *bonâ fide* holder: *Benoir v. Paquin*, 40 Vt.

The holder of a note, as security for money lent, is not chargeable with a wrongful conversion of it by refusing to deliver it up, until the person claiming it pays, or offers to pay, the amount for which it is held: *Id.*

The county court having ruled that the title to the note was in B., and his administrator, and the defendant being thereby left to stand exclusively upon his transaction with his daughter, she was a competent witness, not being within either the terms or intent of the statute excluding, as a witness, a living party to a cause or contract in issue where the other party is dead: *Id.*

CARRIERS.

Liability for Baggage.—The undertaking of a carrier of passengers is, that he will carry the passenger and his trunk to the place of destination, and deliver the same, with its contents, to him there, on presentation of his check for it, within a reasonable time, under the circumstances, after arriving: *Jones v. The Norwich and New York Transportation Co.*, 50 Barb.

Where a traveller by steamboat neglects to present his check and claim his baggage within a reasonable time after the arrival of the boat at the end of the route, the carrier becomes a mere gratuitous bailee; and if the baggage is afterwards destroyed by fire, without any negligence on his part, he is not liable for the value: *Id.*

Where a traveller by steamboat, on reaching the end of one of the stages of her journey, not wishing to be troubled with her trunk, intentionally abandoned it to the care of the carrier, without any inquiry about it, or presentation of her check, or explanation, special arrangement, or notice, for about seventeen hours, while she left the boat and went about three miles to visit a friend; and during that period the trunk with its contents were accidentally and without negligence on the part of the carrier, destroyed by fire, in a baggage-room on the dock, into which it had been removed by the carrier's employees. *Held*, that the carrier was not liable for the value of the trunk and its contents: *Id.*

Held, also, that the statute of Connecticut, prohibiting the doing of any secular work, or travelling, on the Lord's day, did not vary or affect the question of the carrier's liability; and that it furnished no excuse for the traveller leaving her trunk in the manner she did, on Sunday morning, without any special arrangement for its keeping, until her return on Monday, and without notice to the captain, baggage-master, or other employee of the carriers: *Id.*

CONTRACT.

Statute of Frauds—Damages—Sale.—Where, under a verbal contract of sale of 1900 bushels potatoes, one car load was received and paid for, this took the contract out of the Statute of Frauds as to the entire contract as originally made, notwithstanding the defendant had previously written the plaintiff to purchase no more for the defendant: *Danforth & Co. v. Walker*, 40 Vt.

The plaintiff, however, had no right, after receiving the letter, to purchase potatoes and then recover for loss sustained on them by frost and rot. His damages as to such after purchases, must be limited to the difference between the price the defendant had agreed to pay the plaintiff, and what it would cost the plaintiff to procure and deliver them: *Id.*

If the potatoes were to be delivered in good condition, and no time was stipulated within which the defendant was to take them, he would have a reasonable time for that purpose, and would not be liable for loss occasioned by freezing or rot before such reasonable time had elapsed: *Id.*

Soldiers' Bounty—Towns—Evidence.—It is a rule in the construction of contracts that any contract is to be construed with reference to its object—so that effect may be given to the intention of the parties when ascertained: *Johnson v. Town of Newfane*, 40 Vt.

A town having voted to pay a bounty to those who should enlist under an existing call for troops and apply on its quota, is bound to pay to those who enlisted previous to the vote, but were mustered in subsequent thereto—they having had the right at the time of muster to be credited to any town they chose: *Id.*

On the 30th of November 1863, the defendant town voted to "raise \$300 for every volunteer that may enlist previous to the 5th day of January next under the last call of the President for 300,000 volunteers." And it was further voted "that the selectmen be authorized to borrow a sum of money, not exceeding \$3000, to be paid \$300 to each recruit when mustered into the service of the United States." The town had eleven men to furnish under that call. The plaintiff enlisted November 13th, and was mustered in December 1st 1863, to the credit of said town, and with the expectation at the time of enlistment that he should receive the same bounty that the town might pay to others, otherwise he would not have enlisted or been mustered in to the credit of that town. The selectmen had notice of his enlistment and claim for bounty prior to said meeting. *Held*, that he was entitled to recover the \$300 bounty—and that evidence as to his expectation was properly received: *Id.*

CRIMINAL LAW.

Evidence.—On the trial of an indictment against a husband for administering poison to his wife, with intent to kill her, the wife may be admitted as a witness for the prosecution. And being a competent witness, there is no rule by which any part of her testimony should be excluded: *The People v. Northrup*, 50 Barb.

DAMAGES.

Threatening Letter.—To warrant an action against one for writing a letter giving information wilfully false, and with the malicious design of annoying the plaintiff, and frightening him out of town, the loss or inconvenience sustained must be the direct and reasonable result of the letter and of a reliance upon it, and must consist of something more than mental suffering or annoyance. The letter in this case would justify neither anxiety nor expense: *Taft v. Taft and Wife*, 40 Vt.

DEED.

Covenant as to mode of Building upon, or using Premises.—The acceptance, by the grantee, of a conveyance containing a covenant by him, his heirs, and assigns, as to the manner of building upon, or using, the premises conveyed, is equivalent to an express agreement on his part, to perform the covenant; and the obligation affects the title of his grantees: *The Atlantic Dock Co. v. Leavitt*, 50 Barb.

Where the covenant was, among other things, not to erect or permit, upon the premises conveyed, any brewery, *distillery*, slaughter-house, or "other noxious or dangerous trade or business," and the defendants, in one case, had erected a manufactory for the distillation of train-oil, and in the other, a manufactory for the production of paraffine; in both cases the building and machinery being like those usually employed in the distillation of alcohol, and the evidence showing that such distillation might be accomplished by means thereof. *Held*, that the defendants were disabled by the covenant from erecting or maintaining such buildings or machinery; and that it was not necessary, in order to show a breach thereof, to prove an actual use of such buildings and machinery for the purpose of a distillery; that it was enough that they might be so used; and that a breach was committed before an actual use: *Id.*

Held, also, that if the buildings in question were not distilleries, within the meaning of the covenant, they fell within the prohibition against "other dangerous trade or business:" *Id.*

EVIDENCE.

Waiver of Objections to.—Where no objection is made to evidence on the trial, and no exceptions taken to its admission, *it seems* the court will not reverse the judgment, even though satisfied that the evidence was originally inadmissible. The party should be held to have waived the objection by not raising it at the trial: *Voorhis v. Voorhis et al.*, 50 Barb.

EXECUTORS.

Where an executor has received a portion of the estate, and sold the same, and applied the money arising from the sale to his own business, thereby commingling it with his own property, and preserving no evidence by which the trust fund can be identified; in the distribution of the assets of such executor, after his death, by the surrogate, no preference can be allowed in favor of the trust estate on account of such moneys, but the estate must stand on a footing with the other creditors of the executor: *Barlow, Executrix, &c., v. Yeomans, Adm'r., &c., et al.*, 50 Barb.

FIXTURES.

Windows and Blinds.—Double windows made for a house, fitted to its window casings, not nailed or fastened in, but held only by being closely fitted and pushed in, which remained in through one winter until warm weather when they were taken out and set away in the house, and blinds made for side lights and set up in the hall, but never fitted to the windows or put in, both windows and blinds not being intended by the grantor to pass with the house, but secreted so that the grantee did not, at the time of purchase, know of their existence, and there being nothing about the casings to indicate that any double windows belonged thereto. *Held*, not to pass by deed of the premises, they never having been actually or constructively annexed to the house: *Peck v. Batchelder*, 40 Vt.

INJUNCTION.

To stay collection of a Tax.—The equity powers of the Supreme Court cannot be successfully invoked to stay or prevent the assessment or collection of a tax: *Messeck v. The Board of Supervisors of Columbia County*, 50 Barb.

INTEREST.

Upon an unliquidated Demand.—The rule, as modified by recent decisions, allows interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market values, because such values are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he is to pay: *Sipperly v. Stewart*, 50 Barb.

JOINDER.

Of Causes of Action.—A cause of action for the recovery of money

collected upon a judgment regular on its face, and not for a tort, is improperly united with a cause of action to recover damages for an alleged false imprisonment of the plaintiff, where it does not appear satisfactorily and clearly from the complaint, by a proper statement of the facts, that the causes of action arose out of the same transaction. A mere general allegation that they so arose, is not enough: *Flynn v. Bailey*, 50 Barb.

The provision of the code requiring that the complaint shall contain a plain and concise statement of the facts which constitute the cause of action, applies to each count of the complaint; and the general allegation that the second cause of action arose out of the transactions connected with the first, does not establish a case within the above rule: *Id.*

SALE.

Personal Property—Memorandum—Parol Evidence.—The defendant sold the plaintiff a farm, together with certain farming tools and other personal property, and executed a memorandum of such sale of the personal property, in which many articles were enumerated, and concluding with these words: "Meaning all the farming tools, &c., now owned by him (the defendant), and on said farm." *Held*, that parol evidence was admissible for the purpose of ascertaining to what specific property these words applied: *Rugg and Elliott v. Hale*, 40 Vt.

Language in a memorandum of sale, descriptive of the locality of personal property sold, if incorrect, does not affect the validity of the sale: *Id.*

Intoxicating Liquors—Stoppage in transitu—Replevin.—The right of stoppage *in transitu* cannot be enforced by suit in this state as to intoxicating liquors sold therein contrary to law, the statute having taken away all right of action for the recovery or possession thereof: *Howe and French v. Stewart*, 40 Vt.

K., who was insolvent, ordered at Johnson, Vt., of M., the agent of H. & F., merchants at Boston, Mass., intoxicating liquors. Upon the receipt of the order from M., on the 21st day of January 1867, H. & F. shipped the goods by railroad directed to K., Waterbury, Vt. After their arrival at their place of destination, they were put into the freight depot of the Vt. C. Railroad Co. On the 30th day of January 1867, while the goods were in said depot, the charges for transportation not having been paid, and before K. or any one in his behalf had exercised any control over them, they were attached by the defendant, a deputy sheriff, on a writ against K., as his property, but were not taken from the depot. On the 5th day of February 1867, the attorney of the plaintiffs notified the agent of the railroad company in charge of the depot, the goods being still there, of their claim to stop them *in transitu*. *Held*, that the *transitus* was at an end, and that the plaintiffs' right of stoppage *in transitu* had ceased: *Id.*

TENDER.

Pleading—Waiver—Interest.—The plaintiff having traversed a plea of tender, and tried the issue of fact before the jury, cannot, after the charge, insist that the defendant had no right to make such plea, and thus try the question as to the sufficiency of the plea on exception to the charge: *Carpenter v. Welch*, 40 Vt.

If a tender is received, though made subsequent to the time limited by the statute for making it, it operates as a payment to the amount of the sum so received, as of the time when made: *Id.*

In computing interest with annual rests, in the absence of any evidence of a different understanding between the parties, the first rest is to be made at the end of one year, computing from the commencement of the account, and so from year to year: *Id.*

TROVER.

Conversion—Deposition.—Where one obtains possession of another's property, though lawfully, and sells it, believing it to be his own, the sale is a conversion: *Morrill v. Moulton*, 40 Vt.

The adverse party notified to be present at the taking of a deposition has not two hours after the time named in the citation to make his appearance, but the magistrate may proceed at once. The statute limits the right of the magistrate to proceed to the condition of his being present within two hours of the appointed time; *Id.*

USAGE OR CUSTOM.

Evidence of a general *usage* or *custom*, in a particular locality or business, is not sufficient to charge a party, where there is no proof that he *knew*, or had even heard of, such usage or custom: *Sipperly v. Stewart*, 50 Barb.

A custom, in order to become a part of a contract, must be so far established, and so far known to the parties, that it must be supposed that their contract was made in reference to it. For this purpose the custom must be established, and not casual—uniform and not varying—general, and not personal, and known to the parties: *Id.*

VENDOR AND PURCHASER.

Tender of Bond and Mortgage by Purchaser.—Where a vendor is unable to perform his agreement to convey the premises *free from all incumbrances*, for the reason that they are incumbered by mortgage, the purchaser is excused from offering to execute and deliver a bond and mortgage for the purchase-money: *Karker v. Haverly*, 50 Barb.

A tender of performance need not be made when it would be wholly nugatory; and the existence of an incumbrance at the time fixed in the agreement for the execution of a deed, is a breach of the vendor's covenant, which puts it out of his power to perform, and excuses the purchaser from tendering performance: *Id.*

Waiver of Performance.—Where a vendor was at the place appointed, with the holder of a prior mortgage, who was ready to cancel such mortgage as soon as payment should be made by the purchaser, and such mortgagee remained there until quite late in the day, when he left for home, after which the money was tendered; and to the vendor's offer to send for the mortgagee and get a satisfaction of the mortgage, the purchaser replied that he could not wait, or would not wait. *Held*, that this amounted to a direct waiver by the purchaser of any further effort by the vendor to obtain the satisfaction, which precluded the former from insisting, afterwards, that the latter had failed to perform: *Id.*

Sale of Goods by fraudulent Vendee.—It is only in a few exceptional cases, when the vendor of goods has the usual *indicia* of ownership and the true owner has parted with the possession, that such vendor can make a sale of the goods which will be valid as against such rightful owner. The general rule is, that a seller of merchandise, having no title, can convey none, as against the true owner: *Spaulding v. Brewster*, 50 Barb.

Where a bill of sale of goods is obtained by fraud, one purchasing from the fraudulent vendee will acquire no title, even if the jury should find that he purchased in good faith. The fraud vitiates the title of the fraudulent vendee, and he can transfer none to another; certainly not without an actual delivery of the goods to him: *Id.*

The original owner having, under such circumstances, the legal title to the goods, and the actual possession, notwithstanding his bill of sale to the fraudulent vendee, such title must prevail over the claim of one deriving title from the latter. The maxim *caveat emptor* applies: *Id.*

WILL.

Destroyed by Fraud, &c.; when it may be established.—Upon the finding of a referee that a will, made when the testator was of sound mind and memory, and when no improper influences controlled him or biassed his judgment, was destroyed by him through fraud and undue influence, the court will sustain a judgment declaring that such will yet remains, in legal effect, a valid will, and may be established as such: *Voorhis v. Voorhis et al.*, 50 Barb.

LIST OF NEW LAW BOOKS RECEIVED BY THE PUBLISHERS OF THE AMERICAN LAW REGISTER.

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THE
AMERICAN LAW REGISTER.

SEPTEMBER, 1868.

THE JURISDICTION OF THE UNITED STATES CIRCUIT COURT IN BANKRUPTCY, ORIGINAL AND APPELLATE—THE EXTENT OF THE EXCLUSIVE ORIGINAL JURISDICTION OF THE UNITED STATES DISTRICT COURT IN BANKRUPTCY—THE LIMITED SPHERE OF THE CONCURRENT ORIGINAL JURISDICTION OF THE CIRCUIT AND DISTRICT COURTS, UNDER THE PRESENT BANKRUPT LAW.

MUCH diversity of opinion exists touching *the nature and extent* of the jurisdiction in bankruptcy of the United States Circuit Courts, and *the extent* to which the jurisdiction of the District Courts is *exclusive*, under the peculiar provisions of the Bankrupt Law of 1867.

By the 1st section of the law original jurisdiction in bankruptcy is given to the District Courts, in their respective districts, in all matters and proceedings in bankruptcy; but this original jurisdiction is not made, or declared to be, *exclusive*. The 11th section of the law, however, in prescribing the mode of instituting proceedings for *voluntary* bankruptcy, requires all such cases in bankruptcy to originate in the District Courts. So that, in this class of cases, which comprehends by far the greater part (perhaps more than nine-tenths) of the cases under the Bankrupt Law in this country, the original jurisdiction of the District Courts is *exclusive*, except so far as it may be qualified by the superintending jurisdiction of the Circuit Court. But the law contains no such provision touching that class of cases denominated proceed-

ings for *involuntary* bankruptcy. The 2d section of the act confers jurisdiction in bankruptcy on the Circuit Courts, in language comprehensive and explicit. The 39th section authorizes proceedings by creditors for *involuntary* bankruptcy, and defines the various grounds for the same; and the 40th, 41st, and 42d sections prescribe the mode of procedure in this class of cases, *but no express provision is made directing in which court they shall originate or be first commenced.* That appears to be left to the election of the creditors under the jurisdiction defined and given in the two first sections of the law. Proceedings of *voluntary* bankruptcy, that is, where the debtor comes in and petitions for his discharge, are essentially different and distinct, both in *nature* and *object*, from proceedings by creditors for *involuntary* bankruptcy. The former are the creature of statute law and unknown to either the common law or equity; while the latter comprehend and accomplish the purposes of all the ordinary remedies in chancery of creditors against fraudulent and insolvent debtors, by bill, petition, and other proper process in equity; and in which the Circuit Courts had, prior to the enactment of the Bankrupt Law, original jurisdiction. The one is intended for the relief of the honest debtor, who, without fault on his part, has been overwhelmed by misfortune or unavoidable commercial disaster, the other intended to give greater efficiency to existing equitable remedies of creditors against the frauds and fraudulent contrivances of dishonest debtors.

The jurisdiction in bankruptcy of the Circuit Courts is derived from the 2d and the 8th sections of the law. The latter, or 8th section, provides for and defines the appellate jurisdiction of the Circuit Courts; and authorizes them to review and reverse the judgments and orders of the District Courts "*in all cases in equity*" on appeal, and "*in cases at law*, on writs of error," when the amount involved exceeds \$500. But the 2d section of the law confers other and different jurisdiction on the Circuit Courts, in the words following, to wit:—

"That the several Circuit Courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a *general* superintendence and jurisdiction OF ALL CASES AND QUESTIONS arising under this act; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court, or by any justice thereof, in term time or vacation."

This provision is alike comprehensive and explicit; and the jurisdiction conferred admits of an appropriate and just application in the judicial organization for which it was intended, without *interpolating* limitations or qualifications by construction, but by giving full effect to the sense and all the words of the law in the order in which they stand, and according to their fair and ordinary import.

The jurisdiction of a court is the power to hear and determine *judicially* a matter or controversy when brought before it *in due form* to invoke judicial action. Although jurisdiction may be conferred upon a court in *all cases* arising under a particular statute, or out of a particular subject-matter, yet that power or jurisdiction *cannot be exercised until a proceeding be instituted before that court* invoking its exercise. Hence, there is no inconsistency or contradiction in authorizing each of *several distinct courts* to hear and determine *all cases*, as of their original jurisdiction, arising under a particular statute or out of a specified subject-matter. It is simply *concurrent original jurisdiction*; and all conflict is prevented by the established rule of judicial action, that where a case arises, over which several distinct courts have concurrent original jurisdiction, that court in which the jurisdiction first attaches, has the right to proceed and determine the case, unless there be *some special provision* made for the transfer of the case from that court to another court having concurrent jurisdiction: *Smith v. McIver*, 9 Wheat. 532.

The different kinds of jurisdiction known to the law, and bearing upon the question under consideration, are the following, to wit: *original and appellate*, and *concurrent and exclusive*.

This jurisdiction given to the Circuit Court under the 2d section must be either *original or appellate, concurrent or exclusive*. It cannot be *appellate* jurisdiction, for that is an appeal from the judgment or decision of another court, and provided for in the 8th section of this act, and it cannot take place until after a court of original jurisdiction has previously acted. On this subject Mr. Justice STORY, in his Commentaries on the Constitution, vol. I., p. 627, said:—

“In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted in *and acted upon by some other court* whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed, in any form

which the legislature may choose to prescribe ; but still, the substance must exist, before the form can be applied to it. To operate at all then under the Constitution of the United States, it is not sufficient that there has been a *decision* by some officer or department of the United States ; it must be by one clothed with judicial authority, and acting in a judicial capacity."

If this jurisdiction of the Circuit Courts be not *appellate*, it must be *original* jurisdiction, and that always imports or implies the power of the court to take cognisance of the case in the *first instance*, except where special provision is otherwise made as to its commencement. It is not, perhaps, essential to the exercise of original jurisdiction, that the case always originate in the court in which it is exercised. Cases originating in the state courts are allowed to be transferred to the United States Circuit Courts ; but this only occurs in cases where the United States courts *might* have taken jurisdiction in the first instance. And the form of originating or first instituting a proceeding for the exercise of original jurisdiction by a court, may of course be subject to special and express statutory provision. The power to hear and determine an original suit, although first commenced in another court, in which no judgment had been rendered, is original jurisdiction. And although original jurisdiction implies the authority of taking cognisance of the suit in the first instance, yet that is not an inseparable incident, as by express provision of law, a court may have the power to determine and render the original judgment in a suit first instituted in another court.

The United States District and Circuit Courts acquire their organic structure, and the form of their jurisdiction, from a statute of the United States. The relation they sustain towards each other, in the same judicial district, is of an intimate and kindred character. In many matters they have heretofore exercised concurrent original jurisdiction ; and the district judge is not only authorized to sit in the Circuit Court with the judge of the Supreme Court, but also in his absence to hold the Circuit Court. It is undoubtedly within the power of Congress to blend to some extent the jurisdiction of these two courts, or even to consolidate them. The Circuit Courts, therefore, can most clearly be empowered to exercise what is termed original jurisdiction, in cases first commenced, or pending, in the District Courts. And although this may be, in one sense, *concurrent*, it may be in the nature of a *superintending* jurisdiction. A superintendence of

one court, over cases originally instituted and pending in another court, is the power of controlling and directing the action of the latter, in the exercise of its *original* jurisdiction, and is, therefore, as a matter of fact, one form of exercising *original* jurisdiction.

The rule is not to be overlooked, that remedial statutes are to be liberally construed; and that courts are bound by the language used by the law-making power, taking the words in their usual and ordinary meaning, and giving full scope to their signification, except so far as they are necessarily qualified by the context, or some express limitation in some other part of the statute, or by some other law.

With these preliminary observations in view, especial attention is invited to the *actual import of the 1st and 2d clauses* of the 2d section of the law above recited. What is the true *nature* and *extent* of the jurisdiction here conferred on the Circuit Court? The *first clause* gives "a *general superintendence and jurisdiction of all cases and questions* arising under this act." Superintendence is the authority of oversight, direction, and control. The superintendence here authorized, is given to a judicial tribunal—is a *judicial power*. It necessarily implies the existence of a subordinate court, in which these cases and questions arise, over which this superintendence is authorized. The court is not named, but the power will reach cases and questions in the District Court, or in any other tribunal which has been, or may hereafter be, authorized to administer the Bankrupt Law. It is the superintendence exercised originally in England by the Lord Chancellor, in all matters and proceedings in bankruptcy pending before the commissioners, and was subsequently exercised by the court of review (after the judicial organization under the statute 1 & 2 W. 4, c. 56) over all matters pending in the Courts of Bankruptcy held by the commissioners under the new organization. In England, the exercise of this superintending power was invoked on petition or motion: 1 Chitty's Gen. Pr. 543. This authority was only partially provided for, in the U. S. Bankrupt Law of 1841, as follows, to wit:—

"That the district judge may *adjourn any point or question* arising in any case in bankruptcy into the Circuit Court for the district, in his discretion, to be there heard and determined, and for this purpose the Circuit Court of such district shall also be deemed always open:" Sec. 6, U. S. Bank. Law of 1841.

But under the present Bankrupt Law, the power of *superintendence* is given in language as comprehensive as that used in the English statute, and in addition thereto, are the words, "*and jurisdiction of all cases and questions*," &c. So, that, besides giving the Circuit Court a general superintendence of all cases and questions arising under this law, there is conferred "*a jurisdiction of all cases and questions arising under the law*." If the words, "*and jurisdiction*," are to be interpreted as a mere qualification of the superintendence granted, they are superfluous and unmeaning. For the "general superintendence" given to the Circuit Court, is a judicial power which is in no wise enlarged or limited by the words "*and jurisdiction*." The ordinary legal signification of the term jurisdiction, as applied to a court, is the authority to take judicial cognisance of a case *in that court*, whereas the superintendence here given, is the power of direction or control over a case, or questions arising in a case, in another court. So, that, taking the words of the statute in the usual sense, and giving to them their appropriate meaning, the language employed is sufficient to confer every phase of original jurisdiction. In reference to the similar language used in the Massachusetts Insolvent Law, the Supreme Court of that state, in *Lancaster et al. v. Choat et al.*, 5 Allen's R. 535, said: "This language is broad enough to include all questions of fact as well as of law, and the forms of proceeding are free from technical restraints." It is limited and controlled, however, by provisions in other parts of the Insolvent Law. So, also, is the provision in the Bankrupt Law, giving jurisdiction to the Circuit Court, limited or qualified by the 11th section, which requires all proceedings of *voluntary* bankruptcy to originate in the District Court. As to these, the original jurisdiction of the Circuit Court can only be in the nature of superintendence. But no such qualification or limitation exists as to cases of *involuntary* bankruptcy, as will appear more fully hereafter.

An opinion is somewhat prevalent, that the jurisdiction given to the Circuit Court, in the 2d section of the law, is limited to a mere *superintendence* over cases and questions, which have been passed upon in the District Court; and, that this superintendence is virtually an exercise of *mere appellate power*. And this opinion seems to be founded mainly on the mistaken impression, that the Bankrupt Law is identical with the Insolvent Law of the

state of Massachusetts, which contains a similar provision, in regard to the jurisdiction of the Supreme Court of that state, and which it is claimed, has been interpreted to that effect by that court.

Messrs. Avery & Hobbs, in their recent work on "The Bankrupt Law," on page 8, in reference to this provision in the 2d section of the Bankrupt Law, say:—

"The sixteenth section of Massachusetts Insolvent Law, General Statutes, c. 118, confers this power upon the Supreme Judicial Court of the state. *The language of the two acts is identical.*"

"Under the provisions of this section, the Circuit Court, as a court of equity, has full powers of superintendence of all cases arising in bankruptcy."

With no disposition to depreciate this highly respectable work, it must be acknowledged that the statement in the above extract is *inaccurate*. If the language of *the two acts* be "*identical*," the Bankrupt Law must be a substantial copy of the Insolvent Law of Massachusetts, in all its provisions. While some of the sections of the Bankrupt Law are in part copied from the Massachusetts Insolvent Law, other sections appear to have been taken from the Bankrupt Law of 1841, and some from the English Bankrupt Law. And not only is this Bankrupt Law applicable to a judicial system essentially different in its organization and the distribution of its judicial power from that of this state insolvent law, but it is also essentially different in many of its material provisions and features, touching the nature of its jurisdiction. The Courts of Insolvency of Massachusetts are subordinate local courts of each county, held by the judges and registers of probate and insolvency at the shire towns of their respective counties. The relation of the Supreme Judicial Court of that state to these local authorities forbids the idea of its being co-ordinate, or having concurrent jurisdiction with them; whereas the United States District Court is, in the same judicial district, a co-ordinate tribunal, and in many things having concurrent jurisdiction, with the Circuit Court; and in its nature and relation to the Circuit Court essentially different from that of the local insolvency courts of Massachusetts towards the Supreme Court of that state. The original jurisdiction of the Supreme Court of Massachusetts is not *concurrent*, but *paramount* and *superintending*, like that of the Lord Chancellor of England over the courts of bankruptcy in that country, held by the commissioners in bankruptcy. No

appeals are allowed in the Massachusetts law from the courts of insolvency to the Supreme Court; but by the 34th section of the law, an appeal is allowed to the Superior Court of the state, but expressly limited to the simple matters of the rejection or allowance of the claims of creditors in the courts of insolvency. By the 17th section all proceedings of insolvency on the application of the debtor, are *expressly required to be commenced in the local insolvency courts of the county*; and by the 103d section all *involuntary proceedings by creditors are likewise in express terms required to be first instituted in said local tribunals*. Very different in these regards, as well as others, are the provisions of the Bankrupt Law of the United States. Here there is no provision *requiring proceedings by creditors for involuntary bankruptcy to be first instituted in the District Courts*. And by the 8th section appeals from the decisions of the District Courts to the Circuit Courts *are allowed in all cases in equity, and writs of error in all cases at law*, where the amount involved exceeds \$500.

These essential differences both in the structure or fundamental organization of these two different judicial systems, and in the very material provisions of the two laws, have a most important bearing upon the interpretation to be given to the language of each act, touching the distribution of judicial powers. *Concurrent original jurisdiction* being usual and appropriate in the relations of the United States District and Circuit Courts, is wholly incompatible with the relation of the Supreme Judicial Court of Massachusetts to the subordinate insolvency tribunals of that state. While the appellate power of the United States Circuit Court under the Bankrupt Law covers every judgment or decision of the District Court, it is not allowed at all from the decisions of these local insolvency courts to the Supreme Court of the state, and allowed to the Superior Court only to a limited extent. And while all proceedings under this state law are by express terms required to be commenced in the local courts of insolvency, the Bankrupt Law has no such provision as to proceedings in *involuntary bankruptcy*. It cannot, therefore, be correctly said that either "the language of the two acts," or their essential provisions touching the distribution of jurisdiction, are "*identical*."

If the expression of these authors was intended in a restricted

sense, and to be limited to the language of the 2d section of the Bankrupt Act, as compared with the 16th section of the state law, it is *still inaccurate* in point of fact. The language or words used in the two acts in this respect are not "*identical*." The Bankrupt Law gives the Circuit Court jurisdiction of *all questions*, as well as *all cases arising under this act*, while the Massachusetts law gives the jurisdiction only as to "*all cases arising*," &c. This is a very material difference. Touching this distinction, Chief Justice MARSHALL, in the famous case of Jonathan Robbins, said:—

"*A case in law or equity was a term well understood and of limited signification. It was a controversy between parties that had taken a shape for judicial decision. If the judicial power extended to every question under the Constitution, it would involve almost every subject proper for legislative discussion and decision:*" 5 Wheat. Rep., Appendix. Giving the court jurisdiction of *all questions* which may arise under the Bankrupt law, is granting a jurisdiction to hear and determine all questions arising under the law, which can be legally presented to the court for adjudication, however and wherever the jurisdiction may be legally invoked.

Where the jurisdiction conferred is of the general character of a *superintendence*, and has reference to "*cases*" which the express terms of the act have required to be first instituted in another court, it would necessarily have to be construed as a mere *superintending jurisdiction*. And such is necessarily the construction given to the Insolvent Law of Massachusetts. But where the jurisdiction conferred is denominated a *jurisdiction* in addition to "*a general superintendence*," and is extended to all *questions* as well as *cases* arising under the act, how could the court refuse to take cognisance of any such question, when presented in due and legal form in a case not required by the law to be first brought in another court? Why did Congress, in copying the phraseology of the 16th section of the Massachusetts law, deem it proper to make a change, and go further and extend the jurisdiction to "*all questions*," as well as *cases*? Was this a vain thing which meant nothing? Has it no significance when considered in connection with the fact that proceedings in bankruptcy by creditors against insolvent and fraudulent debtors (which was one of the ordinary subjects of the equity jurisdic-

tion of the Circuit Court prior to the enactment of the Bankrupt Law) are not now, by the terms of the law, required to be first brought in the District Court? Messrs. Avery & Hobbs, on p. 11 of their work above mentioned, say, on this subject:—

“The court will grant relief under this section in all cases under this statute *where the statute itself has not prescribed a specific mode of relief*: *Wheelock v. Hastings*, 4 Met. 504; *Eastman v. Foster*, 8 Id. 19; *Barnard v. Eaton*, 2 Cush. 294.”

Under this rule, sanctioned by the decisions of the Supreme Court of Massachusetts, the United States Circuit Court can grant relief as of its *original* jurisdiction in proceedings of *involuntary* bankruptcy, inasmuch as they are not by any specific mode of relief, prescribed in the law, required to be first brought in the District Court.

The idea that the superintending jurisdiction under the Massachusetts law had been interpreted by the Supreme Court of that state to be *appellate* jurisdiction, is an entire mistake. The decisions have been just the reverse. In *Barnard v. Eaton*, 2 Cush. 294, the petition was presented as upon an appeal. But the court held that they could not sustain it as an appeal, but did sustain it as an original petition, and granted the relief. And in *Lancaster et al. v. Choate et al.*, 5 Allen 534, the court, in reference to this provision in the Massachusetts Insolvent Law, said:—

“It is not to be regarded as an appellate jurisdiction, for such a construction of the law would be contrary to the manifest intent of the legislature, and the existence of such a jurisdiction would create needless delays and embarrassments in the operation of the system. Where a right of appeal is given as in case of a creditor whose claim is disallowed, it is given in unequivocal terms, and the appeal is to the Superior Court: St. 1838, c. 163, § 4. Yet in describing the jurisdiction of this court, and also the process by which parties may apply to the court and its course of proceeding thereon, the statute employs very comprehensive terms. It is a general superintendence and jurisdiction, as a court of chancery, in all cases arising under this act,” and “in all cases which are not herein otherwise specially provided for, upon the bill, petition, or other proper process of any party aggrieved by any proceedings under this act, to hear and to determine the case as a court of chancery, and to make such order or decree therein as law and justice shall require:” St. 1838, c. 163, § 18.

The reasons assigned by the Supreme Court of Massachusetts in the same case, arising out of the peculiar nature of their local judicial system, sufficiently show that the interpretation given to this state Insolvent Law can have *no just* application in giving a

construction to this provision in the Bankrupt Law of the United States. They are as follows :—

“The reason for making this provision so extensive is to be found in the character of the Insolvent Laws. They invest courts of inferior jurisdiction, and for a time invested masters in chancery with an extensive power over the person, as well as the whole estate and business of an individual alleged to be insolvent, and interfere with the rights of his creditors, and of persons who have contracted with him. One important object, which is expressed by the statute in respect to the jurisdiction of this court, is to establish and maintain a regular and uniform course of proceedings in all the different courts. Another principle, which is so important that the legislature cannot be supposed to have overlooked it, is the right of trial by jury. There was not and could not well be a jury trial established in the courts of insolvency. The delays, perplexities, and expense incident to it would have destroyed the value of the system. The jurisdiction conferred on this court was manifestly intended to meet every exigency, whether foreseen or unforeseen. If the inferior tribunals should err as to the law or the facts, any party aggrieved was authorized to apply to this court, by a process adapted to the nature of his case, and might obtain an appropriate redress. His application does not bring the whole case before this court, but merely the point in respect to which he is aggrieved; and when the matter is corrected, everything else remains unchanged in that court.” 5 Allen 535.

The provisions of the Insolvent Law mentioned, expressly requiring all cases, whether instituted by a debtor or by a creditor, to be commenced in the local courts of insolvency, necessarily limited the operation of the language prescribing the jurisdiction. Any provision, general in its terms, may be limited, by some other provision of the same statute affecting its operation. This jurisdiction of the Supreme Court of Massachusetts, which is determined to be *original* jurisdiction, cannot be exercised until after a case is instituted in the local courts of insolvency, on account of the express provision requiring *all cases* to be first commenced there. But that court has fully recognised the rule, in the above cases cited by Messrs. Avery and Hobbs, in 4 & 8 Met. and 2d Cush., that in the exercise of this jurisdiction, it can grant relief under all circumstances, and in all cases, where not restrained by some other specific mode of relief prescribed in the statute. The same restriction operates upon the jurisdiction given to the Circuit Court in the 2d section of the Bankrupt Law, as to cases of *voluntary* bankruptcy, but not as to cases of *involuntary* bankruptcy, because the law has not specifically required them to be first instituted in the District Court. Here the matter stands; and upon the principles settled by the Supreme Court of

Massachusetts, in construing the Insolvent Law, the Circuit Court of the United States has concurrent original jurisdiction with the District Court, in cases of *involuntary* bankruptcy in the first place, and can take cognisance of such a case in its first commencement.

This view of the question is incontestably established by the 2d clause of the 2d section, which gives the Circuit Courts jurisdiction in cases commenced therein, "upon bill, petition, or other proper process." After conferring the superintendence and jurisdiction in the first clause, in the comprehensive manner above mentioned, the second clause follows, "and *except* when special provision is otherwise made (the Circuit Court) may, upon bill, petition or other proper process of *any party aggrieved*, hear and determine the case as a court of equity." The *exception* here made covers at least all cases of *voluntary* bankruptcy; for as to these, special provision is "otherwise made," in sect. 11, which requires them to be commenced in the District Court. The remedy is here given "*to any party aggrieved*," in *general terms*, which would reach the case of a creditor "aggrieved," by the fraud of his debtor. To limit this provision by interpretation to a party "aggrieved" by an erroneous proceeding in the District Court, would be interpolating a limitation, which neither its context nor its reason required. The provision in this particular in the Massachusetts Insolvent Law is different. The state statute of 1838 contains, in this provision, the following words: "upon the bill, petition, or other proper process, of any party aggrieved *by any proceedings under this act*," &c.: St. 1838, c. 163, § 16: 5 Allen 535. In the revision of the general statutes, the words, "*by any proceedings under this act*," appear to have been omitted. But the court said, in the case in 5th Allen, on page 534, that "this change in the phraseology in the general statute c. 118, § 16, did not change the substance of the former provisions." The appeal allowed was to the Superior Court, and limited to the cases of the allowance and the rejection of creditor's debts. And the provision expressly requiring all cases to be first instituted in the local courts of insolvency, substantially made the limitation, which the words omitted would make if retained. Under the Bankrupt Law, the appeal and writ of error, provided for in the 8th section, afford ample remedies for all grievances by erroneous proceedings after judgment in the Dis-

trict Courts; and the superintending jurisdiction given in the first clause of section 2d, affords all the redress required for grievances arising from improper or irregular proceedings in the District Courts prior to judgment. So that this second clause of the section would be wholly superfluous, if limited to grievances arising from proceedings in the District Courts under this act.

And "*the case*" mentioned in the second clause of the 2d section, which the court is to "hear and determine as a court of equity," is, of course, "*the case*" made by the "bill, petition, or other proper process." A proceeding by bill, petition, &c., would make a case; and, as no other case is mentioned in this connection, the inference is irresistible that this must be the case meant.

It cannot be claimed, that this second clause was simply intended to prescribe the mode of procedure, to invoke judicial action under the superintendence given in the first clause. That is not the effect or import of the language used. The manifest object of the 2d section is to define the jurisdiction which it confers on the Circuit Court, and fix its limits; and it is not the purpose here to prescribe a mode of procedure. No such connection is expressed between the subject-matter of the provisions of the first and second clauses. The plain import of the language used in the latter clause is to confer, subject to the specified exception, *further* and *additional* jurisdiction; and the character of it is defined as a proceeding in equity "upon bill, petition," &c. The superintendence given in the first clause is, "*of all cases and questions arising under this act,*" *without reference to the distinction between cases at law and in equity, and not subject to the exception* expressed in the second clause. It would, therefore, be utterly preposterous to say, that the provision of the second clause was intended to prescribe the mode of procedure for the superintending jurisdiction given in the first clause. Subject to the exception as a mere mode of procedure, for the cases and questions of the superintending jurisdiction, it would not probably apply to the one-tenth part of them.

The fact that the Bankrupt Law has specifically required all cases of *voluntary* bankruptcy to be brought in the District Courts, but contains no such requirement as to cases of *involuntary* bankruptcy, implies that the latter were left to the concurrent original jurisdiction of the Circuit and the District Courts.

Why was express provision made requiring the one of these two classes of cases to be brought in the District Courts, and none such made as to the other? It is true, that prior to the Bankrupt Law, no proceedings by debtors for their discharge from the obligations of their creditors existed, in the Federal courts; but proceedings upon bill, petition, and other proper process, by creditors, on account of the fraudulent devices, concealments, and conveyances of failing and absconding debtors, did exist, and could previously be maintained in the Federal courts; and constituted one of the important remedies within the jurisdiction of the Circuit Court. When a creditor residing in one state sought redress for the frauds of his debtor in another state, it was deemed important to afford him the benefit of the jurisdiction of the United States Circuit Courts. Is it reasonable to presume, that Congress intended to deprive the citizens of the different states of the advantage of this original jurisdiction of the Circuit Courts? The Bankrupt Law supersedes these previous remedies in equity. And had it been intended to strip the Circuit Court of this important jurisdiction, for the relief of creditors, against the fraudulent conduct of failing debtors, it is fair to presume, that an express provision would have been made in the Bankrupt Law touching this class of cases as well as those of voluntary bankruptcy.

It has been argued, that the language of the 2d section, which comes immediately after that part of the section above recited, is inconsistent with the position here insisted on, and which is as follows: "Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district, of all suits at law or in equity, which may or shall be brought by or against the assignee in bankruptcy," &c. This is an argument founded upon *emphasis*, and assumes that the emphasis is on the word "*concurrent*," thereby implying that the jurisdiction defined in the previous part of this section was not concurrent jurisdiction. But if the emphasis should be placed on the word "*also*" instead of the word "*concurrent*," the implication is equally as strong the other way, that is, that the jurisdiction defined in the second clause, which is the next preceding clause of the section, is *concurrent* jurisdiction. And the only way to determine on which of these words to place the emphasis, is first to ascertain the kind of jurisdiction defined in the preceding clause. Now, it

having been incontestably established, that the jurisdiction conferred by the next preceding clause, "upon bill, petition, &c., in equity," is in fact original jurisdiction, and, therefore, *concurrent*, the emphasis must be placed on the word "*also*," and thus, by implication, it sustains the true interpretation of the language used.

Again, it has been urged, that the language of the first section of the law, declaring that "the several District Courts are constituted *courts of bankruptcy*," is incompatible with the position here taken. What is meant by constituting the District Courts of the United States "*courts of bankruptcy*?" Does this phraseology invest these courts with jurisdiction in bankruptcy? If so, the language of the statute, which immediately follows it, is idle and superfluous; for it grants to the District Courts specifically and in express terms original jurisdiction in bankruptcy, and particularly authorizes them to hear and determine upon all matters in bankruptcy according to the provisions of this act, and, further, expressly extends the jurisdiction to all the matters and proceedings in detail of a case in bankruptcy, "until the final distribution and settlement of the estate of the bankrupt." Why all this particularity in conferring on the District Courts their jurisdiction, if constituting them "*courts of bankruptcy*" imported *exclusive* original jurisdiction of all matters in bankruptcy? Originally in England, *the courts of bankruptcy* were such as were held by the commissioners designated in the Lord Chancellor's commissions. The original jurisdiction was first entertained by the Lord Chancellor on the petition of the creditor, and after the commission in bankruptcy was granted, the proceedings were conducted before the commissioners under the superintendence and control of the Lord Chancellor. Under the statute of 1 & 2 W. 4, c. 56, a judicial organization was effected, termed "*The Court of Bankruptcy*," composed of four judges and six commissioners, and declared to be "a court of record of law and equity." The judges (afterwards reduced in number) held what was termed "*the Court of Review*," and the commissioners held what were termed "the Courts of Bankruptcy," under the superintendence of the Court of Review, administering the Bankrupt Law, in all its details of adjusting the claims of creditors, and settling the estate of the bankrupt. But under this change in the organization of the bankrupt courts, the original jurisdiction

began upon the petition of the creditor brought before the Lord Chancellor, and the issue of the *fiat* on his authority from the Court of Chancery. Exclusive original jurisdiction was never claimed for the courts held by the commissioners, on account of their being constituted "courts of bankruptcy." That peculiar denomination was given to them, because they were especially charged with the administration of the Bankrupt Laws, in the details of the adjustment of the claims of creditors, and the settlement of the estates of bankrupts. And constituting the District Courts of the United States, "Courts of Bankruptcy" cannot be taken as importing anything more than this.

The language of the first section, which gives the District Courts original jurisdiction, "in all matters and proceedings in Bankruptcy," &c., and "extends it to all cases and controversies arising between the bankrupt and any creditor or creditors," &c., does not import that it is *exclusive*. It is the ordinary language used in defining the jurisdiction of a court with which that of another tribunal may be concurrent. It extends the authority of the court to all matters and cases, in which its judicial power is to be exercised, when a proceeding is instituted invoking its action. The language employed does not preclude the exercise of concurrent jurisdiction by another court touching the same matters, when upon a proper proceeding it may be called into action. When a statute is intended to confer *exclusive* jurisdiction, words must be used which clearly import that meaning and intent. The District Courts are made courts of exclusive jurisdiction in some matters, but the language of the statute used to effectuate this is explicit and unequivocal, as follows, to wit: "The District Courts *shall have exclusive original cognisance* of all civil causes of admiralty and maritime jurisdiction," &c.: shall have also *exclusive original cognisance* of all seizures on land," &c.: "and shall also have jurisdiction, *exclusively* of the courts of the several states, of all suits against consuls," &c.: See Brightly's Dig. U. S. Laws 230 and 231; 1 vol. U. S. Stat. at Large, p. 76, § 9. Had it been the intention of the lawmaker, to make the original jurisdiction of the District Courts *exclusive* in all these matters in bankruptcy, to which it was extended in the first section, some such explicit language as that above mentioned would undoubtedly have been used.

The language of the Bankrupt Law of 1841, which prescribed

the jurisdiction of the District Courts, is not substantially different from that in which the jurisdiction of that court is defined in the present Bankrupt Law; but the language used to confer the jurisdiction on the Circuit Court, in the Bankrupt Law of 1841, is by no means as comprehensive and explicit as that of the law of 1867. And yet it was decided, that "the jurisdiction of the District Court, under that law, was not *exclusive*," but that "the Circuit Courts had *concurrent* jurisdiction of *any matter arising under the Bankrupt Law*, when the subject-matter was proper for a court of equity, and the parties such as the constitution and laws of the United States require:" *Lucas v. Morris*, 1 Paine's U. S. Circuit Court Rep. 396. It is reported to have been held, *McLean v. The Lafayette Bank*, 3 McLean's Rep. 185: "That, in all cases arising under the Bankrupt Law (of 1841), the Circuit Courts had concurrent jurisdiction with the District Courts." And in the case of *McLean v. Meline et al.*, 3 McLean's Rep. 199, it was held, "that the Circuit Court had jurisdiction in the case of a bill filed to set aside a conveyance of effects made in contemplation of bankruptcy, to set aside the transfer, direct the liens to be paid *pro rata*, and the property not levied upon to be distributed among the creditors of the bankrupt." And in the recent work of Mr. Edwin James, on the Bankrupt Law of the United States of 1867, the author, in his notes, on page 12, says:—

"Within and for the district where proceedings in bankruptcy are pending, the Circuit Courts have *concurrent* jurisdiction of all cases and questions in administration of bankruptcy under the act, *as courts of equity*; and have *concurrent* jurisdiction in all cases at law and in equity, to which the assignees, as plaintiffs or defendants, are parties, and in all matters concerning the estate and property of the bankrupt, vested in or claimed by them. The Circuit Courts of the United States have jurisdiction, under the Bankrupt Law, to set aside the transfer of property by the bankrupt in fraud of the law, and in the same proceeding, to direct that such property be distributed according to their legal rights among creditors having valid liens thereon."

The argument *ab inconvenienti* has been urged against the exercise of this jurisdiction by the Circuit Court. When the language of a statute is sufficient to confer clearly the jurisdiction, so that to deny it would render a part of the language used unmeaning and superfluous, the argument drawn from inconvenience may prove want of wisdom in the lawmaker, but it cannot justify judicial legislation: Smith on Constitutional and Statute Law. Vol. XVI.—42

tory Construction, p. 632; Broom's Legal Maxims 140 and cases cited. But is there any foundation in fact for this argument? This original jurisdiction is limited to cases of *involuntary* bankruptcy; and the proportion of them, which will seek this jurisdiction in the first place, will not probably exceed the number of cases in equity in the Circuit Court by creditors on account of the frauds of debtors, if no bankrupt law existed. And with the judicial aids provided by the Bankrupt Law for all cases in bankruptcy, by means of assignees, registers, &c., the Circuit Court could have no more difficulty in the adjustment of the claims of creditors, and collecting and distributing assets, than in the case of a creditor's bill, setting aside fraudulent transfers, marshalling assets and distributing the same, &c. In cases of involuntary bankruptcy the important contest in the litigation occurs prior to the adjudication in bankruptcy. After the adjudication the Circuit Court need have no further trouble in disposing of the case than by its superintending jurisdiction in cases in the District Court. But the District Court being constituted "a court of bankruptcy," and *as such* charged with all matters and proceedings in adjusting the claims of creditors, and settling the affairs of the bankrupt, a case in the Circuit Court, after the adjudication in bankruptcy, could very properly, under the very liberal provisions and ample authority in the law for regulating the practice by rules of court, be sent to the District Court as "the court of bankruptcy," for the balance of the proceedings. No inconvenience to the Circuit Court was found in the exercise of its concurrent jurisdiction, under the Bankrupt Law of 1841.

The utility and necessity of this jurisdiction of the Circuit Court is certainly greater now than was the chancery jurisdiction afforded to creditors prior to the Bankrupt Law. Lord HARDWICKE is reported to have said: "The new laws relating to bankruptcy have turned the edge of commissions of bankruptcy from being as they were originally, remedial to the creditor and in the nature of punishment to the bankrupt, whom they considered as an offender, to be the accidental occasion of great frauds:" Smith, Mont. Dig. 119; Hilliard on Bankruptcy, § 5. One object of the chancery jurisdiction mentioned was to afford creditors in another state a jurisdiction supposed to be less liable to be controlled by local influences than the court held exclusively by the local district judges. The subtlety of overreaching debtors,

and the multitude of insolvents who throng the ante-chambers and portals of the primary and local authorities of the courts of bankruptcy, create influences calculated to interfere with the due administration of justice. While this is one of the usual and, perhaps, unavoidable incidents of a system of bankruptcy, it is not fair to presume that Congress intended by the Bankrupt Law to withdraw from the creditor the original jurisdiction of the tribunal most likely to be above the reach of such influences, the benefits of which he had by bill in equity before its enactment. Such a conclusion should at least not be left to be drawn from mere implication, but be founded upon express provision in the law.

T. W. B.

*Circuit Court of the United States, Maine District, April T.
1868.*

LEWIS AUDENREID ET AL. v. JOHN F. RANDALL ET AL.

Where the consignee of the cargo of a vessel at sea, sells the cargo and delivers the bill of lading, properly indorsed, to the purchaser, the sale is valid and passes the complete title to the goods.

Delivery of the bill of lading is, under the circumstances, a sufficient delivery of the goods to take the case out of the operation of the Statute of Frauds.

If the purchaser afterwards refuse to accept the goods, vendor may sell them and recover the loss from the purchaser.

On the 16th of March, at Boston, A. sold to B. a cargo of coal then at sea, and delivered to B., properly indorsed, a bill of lading, dated March 13th, at Philadelphia, and also a bill of sale of the coal, dated also March 13th, though the evidence showed that it was in fact made on the 16th, and was part of the transaction at Boston on that day. Before the arrival of the coal, B. offered A. one dollar a ton to take it off his hands, which A. refused. On the arrival of the coal, B. refused to receive it, and claimed that the contract was within the Statute of Frauds and void. After some correspondence, A. sold the coal at public auction, and brought suit for his loss in the transaction. *Held*, that he was entitled to recover.

CLIFFORD, J.—Special *assumpsit*, together with the common counts as for goods sold and delivered, and for money had and received. Substantial charge of the special counts is, that the plaintiffs, at the request of the defendants, on the 16th day of March 1865, bargained and sold to the defendants a certain quantity of coal, called Broadtop coal, being the cargo of the brig Russian, then on her voyage from Philadelphia to Portland, as

per bill of lading of the 13th of the same month, amounting to two hundred and eighty-nine tons; and that the defendants subsequently, when the vessel arrived with the coal on board, refused to receive the coal and pay for the same, as they had agreed to do. Contract price of the coal was eleven dollars and fifty cents per ton, and freight at six dollars and fifty cents per ton. Plea was the general issue, but the parties, after the evidence was introduced on both sides, withdrew the case from the jury, by consent, and submitted the same to the court, under the Act of Congress in such case made and provided. Most of the material facts are without dispute, and they may be stated in a very few words. Plaintiffs were merchants doing business in Boston, and the defendants are citizens of Maine doing business in Portland. Wanting to purchase coal, the defendants, on the 16th day of March 1865, called on the plaintiffs at their place of business, and inquired if they, the plaintiffs, had any soft coal on the way from Philadelphia; or, if not, whether they would not ship them a cargo of such coal; and being told that the plaintiffs had just received a bill of lading for a shipment of such a cargo bound to Portland, the defendants inquired if it was for sale, and if so, at what price the plaintiffs would sell the coal. Price asked was twelve dollars per ton for the coal, and the freight, which was six dollars and fifty cents per ton; but as finally agreed, the price, including freight, was eighteen dollars. Defendants agreed to purchase at that price, and the consignees named in the bill of lading, A. C. Morse & Co., indorsed and delivered to the defendants the bill of lading, which was introduced in evidence by the plaintiffs. The bill of lading bears date on the 13th day of March 1865, and appears to have been duly executed at Philadelphia on that day, and the bill of the coal given by the plaintiffs bears the same date, but the proofs show that it was written and delivered at Boston at the time the bill of lading was indorsed and delivered by the consignees, and that it was a part of that transaction. Payment was to be made in cash, and the plaintiffs proved that they had a right to draw for the amount at any time. Freights immediately declined, and the agent of the plaintiffs, one of the consignees, about a week after the indorsement and delivery of the bill of lading, being in Portland, where the defendants resided, they requested him to sell the cargo to some other party, and offered

to give him one dollar per ton if he would take the coal off of their hands. Reason assigned for the request by the defendants was that they should make a loss if they took the coal, but the agent of the plaintiffs declined to accept the proposition. Proofs also show that the vessel arrived at Portland March 29th 1865, with the coal on board in good condition, and that the master notified the plaintiffs by telegraph of her arrival, and that the defendants refused to receive the coal. On the last day of March one of the defendants called at the plaintiffs' place of business, and informed them, or one of the consignees, that the vessel had arrived, and requested them to come to Portland and take care of the coal or to sell it, and stated at the same time that if the plaintiffs would do so they would bear a part of the loss, and that they would make up the residue in other purchases of them in the course of the year. Plaintiffs refused the proposition, and the defendants informed them that they, the defendants, would have nothing to do with the coal. Response of the plaintiffs to that suggestion was, that the plaintiffs, if they, the defendants, refused to receive the coal, would sell it on their account and charge them the difference. They also wrote them to that effect on the same day, in consequence of a telegram from the master that the defendants still refused to receive the coal. Correspondence between the parties was also introduced in evidence, but it contains nothing in addition which is very material. Letter of the plaintiffs to the defendants, dated March 31st of the same year, shows that they received the telegram from the master, and a letter from the defendants to the plaintiffs, dated the 1st day of April following, shows that the defendants on that day enclosed to the plaintiffs the bill of lading of the cargo and the bill of the coal which they received at the time the contract was made. Defendants refused to receive the coal, and thereupon the plaintiffs advertised and sold the coal at public auction.

Principal defence is that the contract was within the Statute of Frauds and void. Contract was made in Massachusetts, and the statute of that state provides that no contract for the sale of goods, wares, or merchandise, for the price of fifty dollars or more, shall be good or valid unless the purchaser accepts and receives part of the goods so sold, or gives something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain is made and signed by the

party to be charged thereby, or by some person thereunto by him lawfully authorized: Gen. Stat. 327.

Where the statute does not apply, it may be laid down as a well-settled general principle that, if the parties have agreed, the one to buy and the other to sell specific articles of personal property, of which the price, weight, measure, and requisite fitness are definitely prescribed, or if the terms of the contract provide suitable means by which those qualities or conditions may be ascertained, and the articles which are the subject of the negotiation are in the state for which the parties contracted, the property passes *eo instanti*, by virtue of the contract of sale and without delivery. Repeated decisions have affirmed the rule that when the terms of the sale are agreed between the parties, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute, as between the parties, without actual payment of the price or delivery of the articles, and the property and the risk of accident to the goods vest in the buyer, subject to certain qualifications. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or the time of payment. But if the goods are sold upon credit, and the terms of the contract are silent as to the time of delivery, the vendee is entitled to the immediate possession, and the right of property vests at once in the buyer, subject to the seller's right of stoppage *in transitu*, if exercised before the former actually obtains the possession: *Leonard et al. v. Davis et al.*, 1 Black 483; *Tome et al. v. Dubois et al.*, 6 Wall. ; 2 Kent Com. (11th ed.) 658; *Hinde v. Whitehouse*, 7 East 571; *Holmes v. Crane*, 2 Pick. 599; *D'Wolf v. Harris*, 4 Mas. 515; *Grosvenor v. Phillips*, 2 Hill 147.

Executory contracts only are the subject of remark on the present occasion, as it is clear that where the contract has been in fact fully performed, the rights, duties, and obligations of the parties resulting from such performance stand unaffected by the statute: *Stone v. Dennison*, 13 Pick. 4; *Browne on Stat. of F.*, § 116, p. 118. Although it is true as between the parties that the property vests in the buyer without delivery, when the bargain is complete and everything is done by the seller which the terms of the contract prescribed, yet it is equally true, as is perfectly well established, that as against every one except the

vendor, a delivery of possession is necessary in every valid conveyance of personal property: *Lanfear v. Sumner*, 17 Mass. 110; *Caldwell v. Ball*, 1 Term 205. Actual delivery, however, is often impracticable from the cumbrous nature of the article, and sometimes impossible on account of its situation, or because not present, as in the case of goods or ships at sea. Symbolical delivery will in such cases be sufficient and equivalent in its legal effect to actual delivery, without the actual manual occupation by the purchaser: *Leonard et al. v. Davis et al.*, 1 Black 482; 2 Kent Com. (11th ed.) 671; *Frostbury M. Co. v. N. E. Glass Co.*, 9 Cush. 118.

Delivery of the key of the warehouse in which goods sold are deposited, or transferring them on the books of the warehouseman or wharfinger to the name of the buyer, is in general sufficient to transfer the property, under the terms of a proper contract to that effect: *Chaplin v. Rogers*, 1 East 194; *Dodsley v. Varley*, 12 A. & E. 632.

So the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be a constructive delivery of the goods: *Wilkestral v. Ferris*, 5 Johns. 335. Timber, logs, or other lumber floating in the water, are only in the constructive possession of the owner, and under such circumstances, a symbolical delivery in case of sale is all that can be expected, and is amply sufficient, as between the parties, to pass the title: *Ludwig v. Fallis*, 17 Me. 166; *Boynton v. Veazie*, 24 Me. 288; *Macomber v. Parker*, 13 Pick. 175. Mere words, however, even in the case of cumbrous articles, are not sufficient to constitute a delivery and acceptance of goods such as the statute requires. Superadded to the language of the contract, there must be some act of the parties amounting to a transfer of the possession and an acceptance thereof by the buyer, as where the seller does some act by which he relinquishes his dominion over the property and puts it in the power of the buyer: *Shindler v. Houston*, 1 Comst. 266. Examples put in that case as illustrations are where the key of the warehouse was delivered to the buyer, and where the bailee of the goods was desired to deliver them according to the contract. Words only do not constitute either an actual or symbolical delivery within the meaning of the Statute of Frauds. Extent of the rule, as there laid down, is that there must be some act of the parties superadded to the

language of the contract, which amounts to a transfer of the possession of the goods; but the court do not deny that a valid delivery may be made symbolically in cases where an actual delivery is impossible or impracticable. Undoubtedly a delivery is necessary to give validity to a sale as against subsequent purchasers or judgment-creditors, but it cannot be admitted that in cases where an actual manual occupation of the articles is impossible, as in case of goods or ships at sea, or in case of cumbrous articles, no legal delivery can be made. Such a delivery is legal and sufficient to pass the title, when made in the usual manner and by the usual symbol, fitted to prevent fraud and give certainty to the transaction. Valid sale of personal property, as against subsequent purchasers and judgment-creditors, is sufficient to take the case out of the operation of the Statute of Frauds, if it appears that the title became absolute in the buyer, discharged of all liens on the part of the seller. When goods are sold at sea, the indorsement and the delivery of the bill of lading to the buyer, and the acceptance of the same by him under the contract, are the proper substitutes for an actual delivery and acceptance of the goods, and have the effect to vest a perfect title in the buyer, discharged of all right of stoppage *in transitu* on the part of the seller and indorser of the bill of lading: *Newsom v. Thornton*, 6 East 41; *Pratt v. Parkman*, 24 Pick. 42. Right of stoppage *in transitu* was conceded to the seller in order to prevent the injustice which would take place if, in consequence of the vendee's insolvency while the price of the goods was yet unpaid, they were to be seized and appropriated in satisfaction of his other liabilities, to the prejudice of the rights of his unpaid vendor. The vendor's right in respect to his price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. Such a right attaches to goods sold on credit, where nothing is agreed on as to the time of delivery. In that state of the case, the vendee is immediately entitled to the possession, and the property and the right of possession vest at once in him; but his right of possession is not absolute, because it is liable to be defeated if he becomes insolvent before he obtains the absolute control of the goods: *Bloxam v. Sanders*, 4 B. & C. 948; *Tooke v. Hollingworth*, 5 Term 215; *Lickbarrow v. Mason*, 5 Term 683.

Goods may be stopped *in transitu* so long as the transit con-

tinues, whether by land or water, from the consignor to the consignee, and whether they are in the hands of the carrier, warehouse-keeper, wharfinger, or any other middleman connected with the transportation; but the right of stoppage ceases when the goods have reached their place of destination, and have come to the actual or constructive possession of the consignee: *Covell v. Hitchcock*, 23 Wend. 613; *Mottram v. Heyer*, 1 Den. 487; Smith Mer. L. 683. Possession, actual or constructive, defeats the right of stoppage *in transitu*, and the bill of lading becomes *functus officio* as soon as the goods are landed and warehoused in the name of the holder, as he then becomes possessed of the goods themselves in the eye of the law, and derives his power, not from the bill of lading, but from such possession. Nothing can be more certain than the rule that, as between the consignor and consignee on the one side, and third parties on the other, the indorsement and delivery of the bill of lading by the consignee of goods at sea, and the acceptance of the same by the buyer, under a contract made in good faith, defeats the right of stoppage *in transitu* by the consignor. Settled rule is, that in such cases, where there has been a sale by the consignee which would give a title to the vendee as against the consignor, independently of the indorsement of the bill of lading, the effect of the indorsement will be to take away that right, even in cases where it would otherwise exist: *Gurney v. Behrend*, 3 E. & B. 622; *Pennel v. Alexander*, 3 E. & B. 282. Regarded as consignees, therefore, it is clear that the plaintiffs never had any right of stoppage *in transitu*, as the terms of the sale were absolute, and the indorsement and delivery of the bill of lading by Morse & Co. were absolute and unconditional. Suggestion may be made that Morse & Co. were only agents of the plaintiffs, and that the latter were in fact the shippers and owners of the coal. Suppose that to be so, and even suppose that they are not estopped to deny that the bill of lading expresses their true relation to the goods; still it can make no difference in this case, as the vessel had arrived, and the master had notified the defendants that he was ready to deliver the cargo, and the plaintiffs two days afterwards affirmed the sale, and insisted that the defendants were bound by the contract: *Rowley v. Bigelow*, 12 Pick. 307; *Craven v. Ryder*, 6 Taunt. 433. Bad faith is not imputed in this case, and the Supreme Court, speaking to the precise point under consideration,

say that by the well-settled principles of commercial law, the consignee in the bill of lading is constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsement of the bill of lading to a *bonâ fide* purchaser for a valuable consideration, without notice of any adverse intent, the latter becomes as against all the world the owner of the goods. It matters not whether the consignee in such a case be the buyer of the goods, or the factor or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner and vesting it in the indorsee of the bill of lading: *Conrad v. Atlantic Ins. Co.*, 1 Pet. 445. Same court held, in *Gibson v. Stevens*, 8 How. 399, that where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale or other muniment of title is sufficient to transfer the property and possession to the vendee. Transactions of that character, say the court, if in the usual course of trade, and free from all suspicion of bad faith, have the effect to transfer the legal title and constructive possession of the property to the purchaser; and the court expressly affirm the doctrine, that ships at sea may be transferred to a purchaser by the delivery of the bill of sale, and that goods at sea may be transferred by the indorsement and delivery of the bill of lading; and TANEY, Ch. J., adds, that it is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts: *Grove v. Brien et al.*, 8 How. 436. Actual delivery is a manual transfer of the commodity sold to the vendee, and operates to transfer the title in all cases, unless it be made upon a condition which prevents such a consequence. So a delivery to a common carrier, in the usual course of business, is a sufficient delivery to the vendee, but the right of stoppage *in transitu* remains in the vendor: *Stanton v. Gayer*, 16 Pick. 467. But the *bonâ fide* transferee for value of a bill of lading, indorsed by the consignee of the shipper, takes an absolute title to the goods, free from the equitable right of the unpaid vendor to stop the goods *in transitu* as against the purchaser. The obvious reason of the rule is, that by such a transfer of the bill of lading, the *transitus* is regarded as ended, and the right of stoppage, therefore, is gone: Story on Sales, § 344, p. 414; *Dows v. Greene*, 24 N. Y. 641; *Dows v. Perrin*, 16 N. Y. 325; *Gurney v. Behrend*, 3 E. & B. 622-637.

Views of Mr. Browne are, that in order to work an acceptance and receipt of goods purchased, it is not necessary that there should be an actual manual possession of them by the buyer; and he affirms that the statute requires no other acts of acceptance and receipt than such as are consistent with the nature, locality, and condition of the goods. Substance of his proposition is, that the statute will be satisfied with symbolical acceptance and receipt of the goods, when the case admits of no other delivery; and he expressly states that, in the case of a ship or cargo at sea, the delivery and acceptance of the bill of sale or the bill of lading, will suffice to perfect the transfer: Browne on St. of F., § 318; *Badlam v. Tucker*, 1 Pick. 389; *Gardiner v. Howland*, 2 Pick. 599; *Brinley v. Spring*, 7 Greenl. R. 241. Acceptance and receipt of inaccessible and ponderous or bulky articles may be legally accomplished, in the view of the commentator, by the performance of any act which shows that the seller has parted with the right and claim to control the property, and that the purchaser has acquired that right: *Boynton v. Veazie*, 24 Me. 236; *Bailey v. Ogden*, 3 Johns. 424; *Edan v. Dudfield*, 1 A. & E. N. S. 302.

Proposition of the defendants is, where manual possession of the goods is not taken by the buyer, that "there must be something more than would be sufficient to constitute a delivery and to change the property at common law;" and if by that it is only meant that a sale may be valid at common law, as between the parties, and the contract still be within the Statute of Frauds, the proposition may well be admitted. Subject to that qualification, the proposition is doubtless correct in cases where there is no actual delivery; but if the proposition is understood to include cases by parol contract, where there is a delivery, though symbolical, yet sufficient to transfer the property, not only as between the parties, but as against the creditors of the seller and subsequent purchasers, and to the exclusion of the right of stoppage *in transitu*, then the correctness of the proposition cannot be admitted. Possession as matter of law is not in abeyance; it is somewhere, and if it is not in the seller it must, in contemplation of law, be in the buyer; and if so, then it is clear that the case is not within the Statute of Frauds. Recent English decisions, it is contended by the defendants, assert a different doctrine; but the cases cited, upon careful scrutiny, do not appear to support

any such conclusion. Take, for example, the case of *Meredith v. Meigh*, 2 E. & B. 365, which is the first in the series referred to as maintaining the proposition. Statement of the case shows that the defendants at Handley, on the 12th of April 1850, verbally ordered from the agent of the plaintiff at that place a cargo of china stone-clay, requesting the agent to send it by sea, consigned to certain public carriers at Liverpool, for the defendants, and to be insured by the plaintiff on their account. Plaintiff resided at Cornwall, and the ordinary mode of transportation was by sea to the Mersey, and thence by inland navigation. Both parties knew that the company named as carriers were engaged in transporting goods from the Mersey to the defendants' place of business. Pursuant to the order, the cargo was sent by a vessel selected by the plaintiff, and on the 18th of April an unsigned copy of the bill of lading was forwarded to the inland carriers, with directions that when they received the bill of lading they should forward the cargo. Shipment was completed the 22d of April, and the bill of lading, duly signed, was sent as directed in the order. On that day the vessel sailed, and on the 26th of the same month she was lost. Notice of shipment was given to the defendants, but they remained silent, and there was no evidence that they ever saw the bill of lading. Held, that the delivery to the master of the vessel selected by the plaintiff was not a delivery to the defendants, and that the silence of the defendants did not alter their situation, as there was nothing in the circumstances which required them to take any action in the premises. Some of the judges thought that the case might have been different if the bill of lading had been received by the defendants themselves, and especially if they had dealt with it, or had in any respect acted as the owners of the goods. ERLE, J., said, "I have no doubt that the bill of lading, which is the symbol of property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself," and the Court of Queen's Bench, in the case of *Currie v. Anderson*, 2 E. & E. 593, subsequently so held, although the bill of lading was made out in the name of the plaintiffs. Adjudged cases may be found which seem to imply that there cannot be such an acceptance and receipt of the goods by the buyer as will take the case out of the statute, unless he has examined the goods or done something to preclude him from contending that they do not

correspond with the contract, but the converse of that proposition is now well-settled law: *Morton v. Tibbet*, 15 A. & E. N. S. 428; *Parker v. Wallis*, 37 Eng. L. & Eq. 26; *Fitzhugh v. Williams*, 5 Seld. 565.

Next case cited by the defendants is that of *Bill v. Bament*, 9 Mees. & W. 36, which is a case where the sale was for ready money, in which the plaintiff was not bound to deliver until the payment of the price; and inasmuch as there had been no delivery, the court held that there was no evidence to go to the jury to satisfy the Statute of Frauds. Reference is also made to the case of *Norman v. Phillips*, 14 Mees. & W. 278, which was a verbal order for timber, directing it to be sent to a railway station and forwarded to a described place, as had been the practice between the parties in previous dealings. The timber was sent and arrived at its place of destination, but the defendant, when notified of its arrival, refused to take it. When it arrived it was unaccompanied by an invoice, but one was sent in a few days, which was received by the defendant, and he kept it for a period exceeding a month, and then informed the plaintiff that he declined taking the timber. Verdict was for the plaintiff. Rule to set it aside and enter a nonsuit was granted, which was made absolute, as the evidence was not sufficient to warrant a verdict. Reliance is also placed upon the case of *Farina v. Home*, 16 Mees. & W. 119, although its application is not apparent. Plaintiff shipped goods upon the verbal order of the defendant to his own agent, who stored them and indorsed the warehouseman's receipt to the defendant, who kept it for some months, but denied that he had ordered the goods, and refused to pay the charges on them. Held, that there was no delivery, the warehouseman's possession being considered to be that of the consignee, notwithstanding the endorsement of the receipt, until the warehouseman attorned to the vendee. Comment need not be made upon adjudged cases, where it appears that the goods remained in the possession of the vendor, as it is evident that they do not support the proposition of the defendants in this case: *Castle et al. v. Sworder*, 5 H. & N. 281.

Certain other cases are also referred to, which decide that a delivery of goods ordered to a carrier, without more, is not such a delivery to the buyer as will take the contract out of the opera-

tion of the Statute of Frauds, which is doubtless correct, as in that state of the case there is no acceptance of the goods, actual or symbolical, and they are still subject to the right of stoppage *in transitu* by the seller, and every objection as to quality or quantity by the buyer: *Coombs v. B. & E. R. R. Co.*, 3 H. & N. 510; *Outwater v. Dodge*, 6 Wend. 400; *Howard v. Borden*, 13 Allen 300. Decided cases, where it appears not only that the defendant did not accept the goods sent under an order, but that he refused to do so, need no comment; and if it appears that he merely examined the goods to ascertain their quality or quantity, it cannot make any difference, as in such cases there is no evidence of acceptance: *Kent v. Hutchinsonson*, 3 B. & P. 232. When goods are in the custody of a third person, an order for delivery, with notice to that person, is sufficient to pass the property, even as against the attaching creditors of the vendor: *Tuzworth v. Moore*, 9 Pick. 347; *Carter v. Williard*, 19 Pick. 1; *Burge v. Cone*, 6 Allen 412; *Boardman v. Spooner et al.*, 13 Allen 357; *Whitaker v. Sumner*, 20 Pick. 405. Assent by the party, however, in whose custody the goods are, it is said, is necessary to constitute acceptance and receipt under the Statute of Frauds; but if the parties agree that he shall be considered, as between them, the bailee of the buyer, it is not perceived how the acts of the bailee can defeat the sale: *Bental v. Benn*, 3 B. & C. 423; *Farina v. Home*, 16 M. & W. 119. Text writers agree that a mere delivery of the bill of lading is not enough, without a distinct acceptance of the same by the purchaser; but anything amounts to a delivery and acceptance, says Parsons, which was intended to be so, and was received as such, and which virtually puts the goods within the reach and power of the buyer; and among the cases enumerated by the author where symbolical delivery is sufficient, is that of the indorsement and delivery of a bill of lading: *Pars. Mer. L.* 75. Most recent text writers in England also maintain the same views, and there is no decision to the contrary: *Maclachl. on Ship.* 341; *M. & P. on Ship.* 143; *Chitty on C. & M.* 403; *Lickbarrow v. Mason*, 6 East 23. Argument of the defendants is, that there is no difference between the case at bar and that of an ordinary order; but it is not possible to adopt that suggestion, as a different rule prevailed for a century before the revolution. The consignee of a bill of lading,

said HOLT, Ch. J., has such a property that he may assign it over: *Evans v. Martell*, 1 Ld. Raymond 271. If the goods are *bond fide* sold by the factor at sea (as they may be where no delivery can be given), the sale, said Lord MANSFIELD, will be good, and the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: *Wright v. Campbell*, 4 Burr. 2046; *Davis et al. v. Bradley et al.*, 28 Vt. 121. Indorsement and delivery of a bill of lading passes no title, if the instrument was stolen, or if the consignor was not the owner of the goods; but if the assignment was *bond fide*, the transfer, delivery, and acceptance of the symbol transfers everything which it represents: *Newsom v. Thornton*, 6 East 41. Acceptance in such a case is the acceptance of the goods, and has the effect to take the case out of the operation of the Statute of Frauds, as it vests the absolute dominion of the goods in the buyer, and the right of *stoppage in transitu* ceases from that moment: *Dows v. Green*, 24 N. Y. 642. Even suppose it were otherwise, still the plaintiffs would be entitled to judgment in this case, in view of the special circumstances set forth in the statement. Delivery of the bill of lading, together with the bill of the coal, was made at the date of the contract. Subsequent conduct of the defendants clearly shows that they regarded the transfer of the property as complete, as they offered to pay the plaintiffs one dollar per ton to take it back and release them from the contract. Although the plaintiffs refused to do as requested, still the defendants retained the bill of lading and the bill of parcels, without any intimation that they should not receive the cargo. They substantially repeated the request after the vessel arrived, and the same being again refused, they still retained the muniments of title until the 1st of April, when they were returned as described in the statement. Due notice was given of the time of the sale of the cargo, and it was properly sold as required in such cases. Plaintiffs are entitled to judgment.

Supreme Court of New York.

OWEN A. GILL AND OTHERS v. EDMUND PAVENSTEDT AND OTHERS.

It is a well-settled rule in the law of sales of personal property that when anything remains to be done as between buyer and seller there is no delivery so as to cut off the right of stoppage *in transitu*, or the right of detention for unpaid purchase-money. It is not necessary that the act remaining to be done should determine the quantity or the quality of the goods sold, but it may be any act whatsoever, within the contemplation of the parties to the contract.

A. purchased goods warehoused in a bonded warehouse from the importer, B., in whose name they were entered. The goods were bought on a credit at a specified price, and the duties were to be paid by A. as a part of the price. He had withdrawn by permission of B., parcels of the goods at different times, paying the duties on such parcels. Before the credit expired B. gave to A. an order on the bonded warehouseman to transfer the residue of the goods to A.'s name, which was done accordingly. As between the parties and the government, the goods still remained in B.'s name. They could only be withdrawn under the regulations of the treasury department, by a "withdrawal entry," signed by B. or by some one authorized by him in writing. While the goods were in this condition the purchaser, A., became insolvent. He demanded that B. should sign the necessary withdrawal entry, which the latter refused to do, except upon full payment of the price.

Held, that an act remained to be done as between buyer and seller of such a nature that there was no delivery either actual or constructive, and that B. had a right of detention of the goods for the unpaid purchase-money.

Held, further, that an action in equity would not lie to compel B. to sign the requisite withdrawal entry, since there was no trust created by the transaction, in the absence of payment or its equivalent.

BEFORE HONS. WILLIAM F. ALLEN, JOSEPH S. BOSWORTH, and THEODORE W. DWIGHT, referees.

Action in equity to compel the defendants to sign a withdrawal entry.

Platt, Gerard & Buckley, for plaintiffs.

Henry Nicoll, for defendants.

BY THE REFEREES.—The facts in this case are briefly these:—

The plaintiffs were, at the time of the transactions hereafter detailed, partners in trade carrying on business as jobbers in teas in the city of New York and the defendants were also partners doing business in the same city as importers of teas.

On the 20th of August 1867 the defendants through the agency of brokers sold to the plaintiffs a quantity of teas amounting to

2388 half chests, imported by them in the bark Japan. Sixty-one of these chests were subsequently rejected by mutual consent, as damaged, leaving the number actually sold 2327. These were warehoused in bond in the defendants' name, with the exception of 26 half chests, which having been retained by the defendants as sample chests, and the duties having been paid by them, were directly transferred to the plaintiffs.

These teas were all marked alike, and were parcel of a larger importation entered by the defendants under one warehouse entry.

The controversy in this case concerns a portion of the 2301 chests. They were warehoused with Snyder & Sons, who kept a private bonded warehouse in the city of New York, duly authorized under the regulations of the United States Treasury Department.

The teas were sold on a credit of sixty days to the plaintiffs at a fixed price per pound. The duties at 25 cents per pound were to be paid by the plaintiffs, and the amount thus paid was to be credited as a cash payment on the teas. The plaintiffs were to have the benefits of the unexpired storage and of the fire insurance running to September 1st. A bill of parcels was furnished to the plaintiffs, specifying the numbers of the chests sold, their net weight, price, and terms of sale.

The United States treasury regulations concerning bonded warehouses are such, that until the duties are paid the goods are in the joint custody of the warehouseman and of an officer of the customs, at the charge and risk of the importer and subject at all times to his order on the payment of the duties.

The defendants, through their attorney in fact, contemporaneously with their entry of the goods gave a bond required by law conditioned for the payment of duties, &c.

By the course of business at the custom-house, whenever it is desired to withdraw the goods in bond or a portion of them from the warehouse, a "withdrawal entry" is made. This must be signed either by the person in whose name the goods are warehoused or by some person duly authorized by that party in writing. Thereupon, on payment of the duties, the goods may be withdrawn, and a "permit" is issued by the collector to the storekeeper of the port directing the goods to be delivered from the warehouse.

Under this practice 500 chests of the tea had been withdrawn
Vol. XVI.—43

by the defendants on the application of the plaintiffs at three several times: 300 on the 24th of August; 100 on the 3d of September, and 100 on the 7th of September. The gold to pay the duties was supplied by the plaintiffs, but nothing was paid to the defendants on account of the teas.

On the 3d of September the defendants gave the plaintiffs an order on Snyder & Sons, directing them to transfer to the plaintiffs all the sound teas which had been sold to them.

Snyder & Sons contemporaneously gave a receipt to the plaintiffs of the following tenor: "Received from bark Japan, transferred from the account of E. Pavenstedt & Co., on storage in Snyder & Sons' stores, subject to the order of [the plaintiffs] 2179 half chests tea, marked, &c." At the same date the plaintiffs insured for \$25,000 gold, the former insurance having expired September 1st.

Such was the effect of these transactions that there were 1801 chests of tea, parcel of the entire purchase, held by Snyder & Sons, and not withdrawn from the bonded warehouse, on the 14th of September 1867. On that day the plaintiffs became insolvent. After that date, and before the commencement of this action, the plaintiffs applied to the defendants either to withdraw the teas themselves, or to permit the plaintiffs to withdraw them. At the same time they offered the gold necessary to pay the duties. The defendants declined this proposition unless they were paid the amount due to them for the tea, on the ground of the insolvency of the plaintiffs, whereupon this action was brought.

The only questions presented on these facts are, whether the title to and possession of the teas have passed so completely to the plaintiffs that the defendants cannot retain them for the unpaid purchase-money, and whether the latter can be compelled in equity to sign a withdrawal entry so that a permit may be issued from the custom-house to allow the plaintiffs to take the teas into their actual possession.

It is urged on the part of the plaintiffs that the ownership of the teas had passed to them, and that in point of law *delivery* had taken place so as to defeat any lien for unpaid purchase-money or to prevent any stoppage *in transitu*. They urge that nothing remained to be done between the parties to the contract, and that the indorsement of the warehouse entry was simply a matter between the defendants and a third party, viz., the government.

They claim that the defendants became bailees or trustees of the warehouse documents, holding them subject to the plaintiffs' control. They say that the question of delivery is one of intention, to be inferred from all the facts in the case, and that the facts that the goods were sold on credit; that the duties were payable by the purchasers; that the benefit of the unexpired storage and fire insurance was made over to them, and the withdrawal of the 500 chests at the plaintiffs' request, all unequivocally show that there was a complete intention to deliver the teas. The effect of these acts, they insist, cannot be overcome by the non-performance of a ministerial formal act like counting or weighing goods or indorsing a warehouse entry.

The defendants say on their part that the lien of the vendor for unpaid purchase-money or the extension of it known as stoppage *in transitu*, is to be treated with favor and should receive a liberal construction—that there is a marked distinction between the passing of the title or right of property upon a contract of sale and the vesting the purchaser with the possession of the thing sold. They admit that the title to the tea vested in the plaintiffs, but say that the possession had never been actually or constructively transferred to them, and that the plaintiffs could not obtain possession without a further and material act on the part of the defendants. They insist that though the ownership has passed, the contract is still executory as to the possession, and that the acts of Snyder & Sons were inchoate and incomplete and were of no effect until the withdrawal entry was made, and that the true test to determine whether a change of possession has been effected or not is, to ascertain whether anything remains to be done by the vendor.

It should be remarked that this case is disembarrassed of some of the considerations which have affected other cases arising under this branch of the law. In many instances, the rights of second or sub-purchasers have been involved, and the courts have protected them by the doctrine of equitable estoppel, or other rule favorable to them. These plaintiffs, the original purchasers, ask a court of equity to interfere actively so as to deprive the defendants of the control of goods for which the former have not paid, do not offer to pay, cannot pay anything. There are certainly no "persuasive" equities in their favor, and they must rest their claim on a technical rule of law.

We hold that the authorities establish the following propositions:—

1st. On a contract for the sale of goods and chattels, there results to the vendor, out of the contract itself, a right to detain the goods as security for the price of them, on the vendee becoming insolvent while the goods remain in the actual possession of the vendor. In such a case the right exists notwithstanding the contract has been consummated so that the title to the goods has become vested in the vendee, and all risk from their depreciation or destruction, not imputable to the misconduct or neglect of the vendor, has been cast on the vendee.

2d. So, too, though the goods may have passed out of the actual possession of the vendor and be in transit from him to the vendee, yet if, when the insolvency occurs, they have not come to the possession of the vendee, but are in the possession of a carrier or other intermediary, the vendor may stop the goods, resume the possession, and hold them as security for the unpaid purchase-money.

3d. Where the goods, at the time the contract of sale is made, though in the legal custody and control are not in the actual possession of the vendor, but are so situated that the purchaser cannot obtain actual possession until a specific act is done by the vendor, if the vendee becomes insolvent before this act has been done, and the actual possession of the goods has not been changed, the vendor may detain the goods as security for the payment of the contract price, and as a consequence, will not be compelled by a court of equity to perform the act in question. The right of detention in case of the intervening insolvency of the vendee, may be exercised by the vendor so long as the vendee has neither obtained actual possession nor been furnished by the vendor with the exclusive means and power of controlling the possession.

We think that the case before us belongs to the class included within the proposition last stated.

In discussing it, it will not be unprofitable to recall some elementary rules in the law of sales. As far as the passing of the title is concerned, the contract of sale may be executed or executory, and it is now well settled that where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into the state in which the purchaser is to be bound to receive them, or where anything remains to be done for the pur-

pose of ascertaining the price where the price is to depend on the quantity or quality of the goods, no title passes, and the contract is executory: *Blackburn on Sales* 152.

The title, however, may pass and the ownership be transferred, and still the sale may be imperfect as to the possession. "The parties may by the terms of their agreement bargain that the right of property shall vest in the purchaser forthwith, but that the right of possession shall remain with the vendor until the fulfilment of any conditions they please:" *Id.* 198.

Such a condition may not only be express, but may be implied from the circumstances of the case. Thus the parties in an ordinary sale are presumed to make the payment of the price contemporaneous with the delivery of the possession, and the possession cannot be had without the payment, though the ownership is transferred.

The authorities establish that a condition preceding delivery may be implied whenever an act remains to be done by the vendor.

It is not necessary, as urged by the plaintiffs, that this act should be with a view to ascertain quality or quantity. That may be a proper test to determine whether ownership has passed, but it is not a sufficient test to determine whether the right to the possession has passed. In *Owenson v. Morse*, 7 Durnford & East 60, the purchaser had bought articles of plate at an ascertained price. He wished to have his arms engraved upon the plate, which the seller agreed to have done at his own expense by an engraver whom he usually employed. The plate, after being engraved, was to be returned to the seller. It was held that the delivery to the engraver was not such a delivery to the purchaser as to cut off the right of detention. It was said by one member of the court that the seller, though he might recover of the purchaser for "goods bargained and sold," could not recover of him for "goods sold and delivered." This case, of course, decides in principle that if the engraving had been done by the seller instead of a third person, he would not have been a mere bailee to do the engraving, and it holds that the act to be done was a condition precedent to delivery. It justifies the remark of Lord BROUGHAM in *Cowasjee v. Thompson*, 3 Moore, India App. 422, that "if anything remains to be done between the buyer and seller, the goods may be stopped."

The most favorable rule which can be suggested for the plain-

tiffs is, to hold that the possession has passed if the goods are under the control of the vendee so that he can reduce them into actual possession without any act of the vendor. If they could have got possession simply by paying duties to the United States without any act on the vendor's part, it might be admitted in the absence of special circumstances, that they had the constructive possession, which they might on payment make an actual possession. This, perhaps, may be inferred from *Portalis v. Tetley*, 5 Law Rep. Eq. Cases 140 (A. D. 1868). It was there held that a factor who had pledged goods for less than their value had them still in "his possession" and control so that he could pledge them for further advances under the "Factors' Act." Vice-Chancellor WOOD held, in substance, that as the pledge could be redeemed at any time, by payment of the debt, the goods were in the factor's possession and control, subject to the debt being paid off.

What then are the acts in the present case which precede delivery? One is the necessity on the part of the vendor of making a withdrawal entry; the other is a duty on the part of the vendee, imposed upon him by the contract, of paying the duties.

The effect of the first of these acts remaining unperformed is well illustrated in the cases under the English Warehousing Acts. The practice under these acts is so different from our own that the authorities must be applied with the greatest caution.

This practice in the case of imported goods is well detailed in the recent case of *Pearson v. Dawson*, 1 Ellis, Blackburn & Ellis R. 447. It is there said, in the statement of facts by the reporter: "It is not the practice for the officers of the customs to notice any change of ownership. They retain their control over the goods until the duty is paid, after which they leave it to the warehousekeeper to deliver the goods to the person entitled to them. Any original purchaser or sub-purchaser who required [a parcel of the goods] to be delivered to him had to obtain an order in writing signed by the defendant addressed to his warehousekeeper to deliver the parcel, and on presenting the order so signed the parcel would be delivered accordingly if the duty had been paid, and without such an order no one could obtain the delivery of a single parcel:" p. 449.

This order on the warehouseman, known as "the delivery order," is the only act necessary to be done by the vendor. The vendee having the order can immediately reduce the goods to his actual

possession by paying duties. This is in marked contrast to our system, where the order by the vendor on the bonded warehouseman of itself accomplishes nothing, but there must be in addition, as a vital prerequisite, a withdrawal entry signed by the vendor. Under the English system, this act is to be done between the vendee and the government.

This course of business, slightly modified in connection with the warehousing of spirits under the Excise Acts, came under discussion in the Irish cases of *Haig v. Wallace*, 2 Hudson & Brooke 671 (A. D. 1831); *Orr v. Murdock*, 2 Irish Com. Law R. N. S. 9 (A. D. 1851); and *In re Thomas Hughes*, 12 Irish Chan. 450, 463 (A. D. 1861).

In the first and leading case of *Haig v. Wallace*, the plaintiffs were the owners of goods in a bonded warehouse which had been deposited by them as distillers. The goods, twenty puncheons of spirits, were sold to one Meade on a credit, who received a "delivery order" upon the warehouseman, who made a transfer in his books to the purchaser. Soon after ten more puncheons were sold with a like delivery order and transfer by the warehouseman. Three of the puncheons, having been sold to a sub-purchaser, were withdrawn from bond. It appeared that though a document called a "request note," which answers to our "withdrawal entry," was necessary on the part of the seller, yet that as soon as the "delivery order" was granted, the purchaser was authorized by law or custom to *sign in the seller's name*: pp. 673, 674.

The court held, on this state of facts, that the goods were delivered and that the seller had no right of detention, notwithstanding the insolvency of the purchaser. The distinction which we seek to enforce is expressly taken. Says the court: "If a constructive possession be given to the vendee by the vendor, the right of stoppage *in transitu* is precluded, and in this case the vendor had no possession himself but a constructive one, for the actual possession remained in the officer, and the vendor by the order of delivery gave that which he had, subject to the claims of the crown, to which the vendee became liable instead of him. *If, indeed, an act by the vendor were afterwards necessary towards giving actual possession of any part of the goods to the vendee, and if the request note necessary for that purpose were in fact the act of the vendor, it would be different, but that is not so: the request note is the act of the vendee using the name of the*

vendor, and the officer receives it as such and acts upon it, and delivers the permit upon it, without any interference or further participation in the transaction by the vendor after his giving the first order for delivery:" pp. 684, 685.

So *In re Hughes*, *supra*, it is said that "the delivery orders form a complete title for possession in the person to whom they are given by the vendor, that is, the revenue officer acts upon them, allowing the party named to pay duty and draw the goods *without any further act* being done by the [vendor]:" p. 464. Again: "The goods are in possession of the crown. The distiller has not actual possession of them. That possession so remains until the duty is paid. * * *Every act* of the distiller [vendor] has been *done to complete* the contract:" p. 466.

It may well be doubted whether these cases are not too favorable to the purchaser. The court in *Haig v. Wallace* misconceived one material fact. The vendor did not cease to be liable on his bond for the duties, and the right of retention ought to continue in that case until the duties are paid. See remarks of PENNEFATHER, B., in *Orr v. Murdock*, *supra*, p. 19. Be this as it may, these decisions show conclusively that the British courts would not hold, under our Warehousing Acts and practice, that a "delivery order" accepted by the bonded warehouseman was equivalent to a delivery, so long as the withdrawal entry had not been signed. These cases fully explain the remark of Lord CAMPBELL, cited by the plaintiffs from *McEwen v. Smith*, 2 House of Lords Cases 309, 330, that if the goods had been transferred on the warehouse-keeper's books, there would have been a sufficient delivery to cut off the vendor's lien. It has reference to the effect of a "delivery order" under the practice already detailed. The Scotch courts take the same view of the effect of the delivery order: Remarks of judges *passim* in *McEwan v. Smith* in the Scotch courts, 9 Court of Session R. N. S. 434.

The position of an English merchant *before granting* any delivery order is quite analogous to the present case. The sale may be complete, yet if the duties are to be paid as a part of the price and they have not been actually paid, or if the merchant has not signed the delivery order, as between buyer and seller there is no delivery.

In *Winks v. Hassall*, 9 Barn. & Cress. 372, A. had two pipes of wine in a bonded warehouse standing in B.'s name in the cus-

tom-house books, who had given a bond for the payment of the duties. A. sold the wine to C. and gave him a delivery order. It was agreed that C. should pay the duties. B. was subsequently called upon to pay the duties on his bond, and removed the goods to his own warehouse. They had not been transferred from his name to that of the purchaser. The court held that the lien continued even though warehouse rent was charged by B. to C., and that it had not been waived by the delivery order, since the goods had never been transferred from B.'s name. No point was made as to the bonded warehouseman, but the whole case turned upon the position that the goods were still entered in B.'s name. PARKE, J., said that "by the contract the bankrupt was to pay a certain price for the wine and the duty also. The duty was, in substance, an additional part of the price to be paid before the vendee could have possession. * * The seller did not waive his right of lien by the delivery order, for no transfer was made." Meaning no transfer with B.

In the Scotch case of *Smith v. Pointer*, 22 Cases in Court of Session 208 (A. D. 1860), the facts were that goods had been sold so as to pass the ownership, and they were sent to a bonded warehouse by the seller, and entered in the custom-house books in his name. The name of the purchaser being marked on the casks, the bonded warehouseman entered them in his books in the purchaser's name. The purchaser then gave a delivery order on the warehouseman, who made delivery accordingly. It was held, in an action by the seller against the warehouseman, that the question was the same as between the seller and purchaser, and that there could be no delivery without a delivery order from the seller. The court said: "A complete personal contract of sale is something quite different from the fulfilment of that contract."

It is true that the court reached a different conclusion in *Pearson v. Dawson*, 1 E. B. & E. 447, as between the seller and a sub-purchaser. In that case the vendor kept a bonded warehouse. The purchaser from him of twenty hogsheads of sugar gave an order in favor of his own sub-purchaser upon him (the seller) as warehouseman. This order the seller accepted by an entry on his books. The sub-purchaser called upon him for a delivery order from time to time, which he furnished. Fourteen hogsheads of sugar remained when the purchaser became insolvent. These

were entered in the vendor's name, and no delivery order had been granted. The court held that as against the sub-vendees there could be no retention of the sugar. As against the original vendees, who had given an acceptance in payment which had been dishonored, it was said that there was a contingent right of detention analogous to stoppage *in transitu*. This might have been preserved as against the sub-vendees by notice. As no notice was given, the equitable right was lost as against an honest purchaser. The remarks of the judges are clear to the point that the entry in the warehouse books as between the vendor and vendee would have had no effect. It was said by Lord CAMPBELL that the entry in the custom-house left a technical possession in the vendor: p. 453. The remark that the lien against the sub-vendees might have been preserved by *notice*, shows that the court must have supposed that it existed as against the vendee, for, of course, no notice to him would be necessary.

These cases appear to us to show that the British authorities are of one accord in maintaining the propositions, that a manual signing of the delivery order is essential even though the ownership has passed; and that when the duties are to be paid by the vendee, there is no delivery until they are actually paid; that when the delivery order is signed, the "request note" (answering to our withdrawal entry) under their practice may be signed either by the vendor or the vendee using the vendor's name, and that as then *nothing* remains to be done by the *vendor*, the delivery is complete; that these principles are wholly unaffected by the question whether there has been a transfer or not in the books of the bonded warehouseman; but that if our practice existed there, requiring the withdrawal entry to be signed by the *vendor*, there would be no delivery until it was signed, and the same rule would be applied where the vendee agreed to pay duties until payment.

The New York cases and other authorities cited by the plaintiffs on the argument, when critically examined, accord with these views.

In *Cartwright v. Wilmerding*, 24 N. Y. 529, GOULD, J., in delivering the opinion of the court, says: "To be entitled to enforce that receipt" (the warehouse-keeper's receipt) "they needed to *make a withdrawal entry at the custom-house*, which withdrawal entry could by *law* be made *only* by the *party in whose name* the merchandise was warehoused, or by some person

duly authorized for the purpose by *him*; then pay the duties and procure the 'custom-house permit.' "

"The warehousing permit * * * would regularly be followed by the withdrawal entry; and the *withdrawal entry* (or the **EXCLUSIVE** authority to make it), *with the warehouse-keeper's receipt*, furnished to the holder the exclusive means and power of obtaining the possession of the property meant to be pledged:" Id. 530.

The *exclusive* "authority to make the withdrawal entry coupled with the warehouse-keeper's receipt * * * come within the ruling (2 Bosw. 444) that they must be 'such documents as will enable the pledgee with *certainty* at the proper time to reduce the goods into his own possession," &c.: Id. 530.

And the court further held that on the facts as found, the withdrawal entry, though made four days after the advance by the pledgee, "should be deemed to have been made at the time of making the advances:" Id. 533.

It is quite evident that the court held that the making of the withdrawal entry, or being *furnished with exclusive authority* to make it, together with the warehouse-keeper's receipt, were essential to work a transfer of the *legal* possession, the actual possession not having been changed. The warehouse-keeper's receipt is treated as ineffectual to produce such a result, until the withdrawal entry has been made or exclusive authority to make it has been furnished.

The concurrence of the two facts was held to satisfy the ruling expressed in 2 Bosw. 444, and to furnish "such documentary evidence of title as gives him (the party holding them) the *exclusive control* of the possession," &c.: Id. 530.

It is quite clear, as it appears to us, from the opinion of the court, that if the proper withdrawal entry had not been made, or exclusive authority to make it had not been furnished, the court would have held the advances not to have been made upon such documentary evidence of title as gave the exclusive control of the possession.

The making of a proper withdrawal entry, or furnishing to the plaintiffs exclusive authority to make it, was indispensable in order to enable the plaintiffs to obtain actual possession. The defendants alone could make that entry or furnish such exclusive authority. So long as they forbore to do either, they controlled

the *possession* as between themselves and the plaintiffs as absolutely and exclusively as if the goods were locked up in their own store and the key of the store was in their pocket.

The case of *Waldron v. Romaine*, 22 N. Y. 368, involved only the question whether the *property* in the goods, or, in other words, whether the *title* to them, had been vested in the purchaser so that he was liable to pay the contract price where they had been destroyed by fire before they came into his exclusive actual possession. They had been withdrawn from the custom-house in New York, and forwarded in bond in a vessel selected by the purchaser, in order to be transported out of the United States to Canada. The vendor had "complied with the terms of sale" on his part. He had done all that he had agreed to do.

The title to goods purchased may have become vested in the purchaser, so as to make him liable for the price in the event of their destruction by fire or other cause not imputable to any misconduct or neglect of the seller before coming to the actual possession of the purchaser, and yet the seller's lien for the unpaid purchase-money may not have been divested.

This proposition is well illustrated by many of the adjudged cases, where the goods were *in transitu* at the time when the seller reclaimed them and resumed their possession for the unpaid purchase-money.

Where a person residing at one place orders goods from a person residing at another, on a specified credit, and directs them to be forwarded by a designated line of transportation, and the person to whom the order is addressed accepts the proposition contained in it, and complies in all respects with the terms of the order, and notifies the other party that he has done so, there can be no doubt that if the goods are lost or destroyed during the transit, the purchaser is liable for the price. The contract has been consummated and the title to the goods has been transferred to the purchaser, and yet if during the transit the purchaser should become insolvent, the seller might stop the goods and reclaim possession before the transit was ended. He might do this, not for the reason wholly or in part that the title had not become vested in the purchaser, but for the reason that although it had become vested, it was vested subject to the right of the seller, by reason of the insolvency occurring during the transit to reclaim possession as security for the price of the goods.

If in the case of *Harris v. Pratt*, 17 N. Y. 249, the goods had been lost between Liverpool and New York, there could be no doubt of the liability of Hall Brothers for the price. The risk of loss from a destruction of the goods sold attends upon the title not upon the possession, where there is no special agreement upon the subject: *Terry v. Wheeler*, 25 N. Y. 520, 524. The fact, therefore, that in the event that the goods in question had been consumed by fire in bond prior to the plaintiffs' failure, they would nevertheless have been liable to the defendants for the price, is not decisive of the non-existence of a right, nor necessarily material in determining whether there was a right in the defendants to refuse, after the plaintiffs' insolvency, to make a withdrawal entry without being first paid the balance of the contract price.

The remark of Chancellor WALWORTH in *Mottram v. Heyer*, 5 Hill 632, to the effect that "the law recognises his rights" (the right of the owner of goods in bond) "to sell or dispose of them as he pleases, subject only to the custody of the officers of the revenue for the security of the payment of the duties at the time when by law those duties become due and payable," and the observations of CLARKE, J., in *Waldron v. Romaine*, 22 N. Y. 370, and of GOULD, J., in *Cartwright v. Wilmerding*, 24 N. Y. 536-37, and other like observations in other cases upon the same point, mean simply, as we understand them, that imported goods while in the public store under the warehousing system established by Congress can be bargained and sold, and the title to them vested in different purchasers in succession, subject only to the lien thereon for the payment of duties, as effectually as if the duties had been paid and the goods released from bond before such contracts of sale were made.

But that proposition does not affect the question whether a purchaser of goods thus situated at the time of his purchase has, on a given state of facts, been furnished with such means and power of obtaining the possession of them, as gives to him, as between him and the seller, the exclusive control of the possession.

The duty to make a withdrawal entry and give an order on Snyder & Sons to deliver the goods to the plaintiffs whenever they, in accordance with the terms of the contract, requested these acts to be done, is a duty incurred by the contract of August 20th 1867. Until these acts had been done, that contract had not

been fully performed on the part of the defendants. Until then, the plaintiffs had not acquired, as between them and the defendants, the legal possession or obtained the exclusive control of the possession. They could not obtain this exclusive control as against the defendants themselves, unless nor until the latter should make a withdrawal entry or furnish to the plaintiffs exclusive authority to make it.

It is not material, according to principle or authority, whether the situation of the goods by reason of which the plaintiffs could neither obtain their possession nor control their exclusive possession, arose from the provisions of the Warehousing Act to which the goods were subject when the contract was made, or from causes wholly created by and within the control of the defendants.

The goods were so situated when the contract was made, that the plaintiffs could neither obtain actual possession, nor divest the defendants of the capacity and power to prevent the plaintiffs from obtaining possession until a withdrawal entry, authorizing the plaintiffs to withdraw the goods, had been made by the *defendants*, or until the latter had furnished them with exclusive authority to make such entry.

Although the amount of the duties was in form credited to the plaintiffs as a payment of that amount of the contract price, yet the duties on the goods remaining in bond had not been actually paid. The goods could not be withdrawn until payment was made, and the existence of a withdrawal entry would be useless in that regard, except for the purpose of releasing the goods from custom-house control on the duties being paid. The good sense of the contract is, that the withdrawal entry should be made when the duties were paid, or the plaintiffs were ready and offering to pay on such entry being made.

Although the act of paying the duties by the plaintiffs to the government would in a certain sense be an act done by one of the parties to this contract to a third party (the government), yet as between these parties it would, within the spirit and meaning of the contract, be an act taking place between the *parties* to the *contract*.

Paying the duties would be paying the contract price *pro tanto* according to its clear legal import, and would be an act in diminution and discharge *pro tanto* of the liability of the defendants

and their surety upon the bond given by them on warehousing the goods. This act precedes delivery, which remains inchoate and imperfect until the payment is made by the vendee, whenever he has agreed to make it: *Winks v. Hassall, supra*.

The question, therefore, is not whether the contract had been consummated so that the title to the goods had vested in the plaintiffs. The whole law of the vendor's lien for the unpaid purchase-money is based on the idea that the title to the goods has been vested in the purchaser. The lien, as it is called, which exists, is a lien on the *purchaser's* property. It is certainly not a lien on the vendor's own property.

Hence it is said in *Arnold v. Delano*, 3 Cush. 88, 38, that "there is manifestly a marked distinction between those acts which, as between vendor and vendee, upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that *actual* delivery by the vendor to the vendee which puts an end to the right of the vendor to hold the goods as security for the price." In that case the title had been changed, but the goods were on the vendor's premises; and although the vendee might, at any time prior to his insolvency, have removed them without any aid or facility being furnished by the vendor, yet he had not done so, and the vendor was permitted to retain them as against the general creditors of the vendee, for whose benefit his property had been vested in an assignee.

This right to retain or stop *in transitu*, on the vendee becoming insolvent, is a right resulting from the contract of sale, and is as truly a part of it as if it were in terms stipulated in the contract itself.

Hence it is said in *Myles v. Gorton*, 2 Crompt. & Mees. 504, 511, that "the general rule of law is, that where there is a sale of goods, and nothing is specified as to delivery or payment, although everything may have been done to divest the property out of the vendor, and so as to throw upon the vendee *all risk* attendant upon the goods, still there *results* to the vendor *out of the original contract* a right to retain the goods until payment of the price:" *vide White v. Welsh*, 2 Wright, Penna. St. R., 396.

The vendor's lien is not divested merely because the goods may have gone out of his actual possession. This is true of all goods stopped *in transitu* while being carried by a common carrier, or

in the hands of some middleman. The general rule is, that the consignor may stop the goods before they come into the possession of the consignee: *Bohtlingk v. Inglis*, 3 East 381. This possession, it was said in *Ellis v. Hunt*, 3 Durnford and East 466, means actual possession: to constitute an actual possession by the vendee the goods must be either literally in his actual possession, or in the actual possession of his agent or servant for him, under such circumstances that the vendee has the exclusive means and power of controlling the actual possession.

The case of *Cowasjee v. Thompson*, 5 Moore P. C. 170, which was so confidently relied upon in the plaintiffs' argument, turned upon such special circumstances that it is of little value as a precedent. In that case goods were contracted to be sold and delivered "free on board." When this language is used, the buyer is, by the English practice, deemed to be the shipper instead of the seller. The effect of this language may be obviated by adding the words "*for and on account of the seller*," or their equivalent: *Crann v. Ryder*, 6 Taunt. 433. The goods were to be paid for by cash or bills of exchange, at the option of the seller. In case he took cash, he was to submit to $2\frac{1}{2}$ per cent. discount. The seller elected to take the bills instead of cash. When the lighterman of the seller placed the goods on board ship, he took receipts from the mate and handed them over to the seller. The court held that the delivery "free on board," and the election to take payment by a bill, made a complete delivery. The seller had no right to the receipts, as he had been *paid*, and he might be compelled in equity to surrender them. The court say, "payment in cash would have been made if the sellers had preferred to lose $2\frac{1}{2}$ per cent. discount, *therefore* they never can be heard to set up the receipts against the purchaser. They are bound to give them up in good conscience, and would have been compelled in equity," &c., p. 174. This case has plainly no analogy to the one now under discussion. In *Berndston v. Strang*, 26 Law Journal N. S. Ch. 879, Sir W. PAGE WOOD, V.-C., says of this case, "there a ship was sent out, goods were ordered for that ship, and the ship *being the property of the person sending her out*, the *transitus* was complete when the goods were delivered on board, pursuant to order, nothing else being directed or intended by anybody." This is, no doubt, a correct version of

the case, except the matter of the receipts, and that was disposed of by the fact of *payment*.

The result is, that the goods in question, when the contract was made, were in bond *deliverable only to the order of the defendants*, and remained in that place and position up to the time of the plaintiffs' insolvency. The plaintiffs could not obtain possession of them without the defendants doing an act which by the legal import and effect of the contract of sale they undertook to do, in part execution of the contract, when the occasion called for it. That act has not been done by the defendants. They have not signed a withdrawal entry authorizing the plaintiffs to withdraw the goods and take possession of them, nor have they furnished to the plaintiffs any authority to make such entry. In our view of the law, upon the facts proved, the defendants have a right to retain the goods as a security for the unpaid purchase-money.

There is another difficulty in the way of the plaintiffs. This is an action in equity, and must be maintained either on the theory of an action for specific performance or for the enforcement of a trust. On the first theory, it would be necessary to tender the price, in accordance with the ordinary practice in such cases, as the vendee is just as truly a trustee of the purchase-money as the vendor of the subject of sale. If the claim is, that there is a trust, the answer is, that this cannot arise in the case of ordinary chattels until the goods are paid for, or the vendor is estopped as against third persons to say that they are not paid for: *Pooley v. Budd*, 14 Beavan 34, 45, 46, 47. This case explains the remark of Lord BROUGHAM in *Cowasjee v. Thompson*, *supra*, on his theory that the goods had been *paid for*, that the receipts were held by the vendor in such a manner that he could be required, in equity, to surrender them. The vendees in the present case being insolvent, and having made no payment, could consequently have no relief in this court.

Such judgments must, therefore, be given as will protect the right of the defendants to retain the goods for the unpaid price.

*United States District Court—District of Massachusetts.*IN RE JAMES B. DEVOE.¹

Where a bankrupt is held under arrest upon state process, in an action of tort in the nature of deceit, it being alleged in the declaration, that he obtained possession of the plaintiff's goods under color of a contract by means of false and fraudulent representations, the United States District Court has no power to discharge the bankrupt upon a *habeas corpus*.

Evidence cannot be received to contradict the declaration, and to show that no such cause of action really exists as is therein set forth.

C. A. & G. M. Reed, for the petitioner.

A. Russ, for the respondent.

LOWELL, J.—The petitioner alleges that he was duly adjudged a bankrupt by the District Court of the Southern District of New York, on the 26th day of May last, and that pending the proceedings in bankruptcy, to wit, June 1st 1868, he was arrested in this city, in a civil action, at the suit of one John C. Nicholas, and is still imprisoned on the writ then issued, and that the action is founded on a debt or claim from which his discharge in bankruptcy would release him. A writ of *habeas corpus* was issued in accordance with Rule 27 of the Supreme Court rules in bankruptcy; and by the return, it appears that the writ contains a declaration in tort in the nature of deceit, alleging certain false and fraudulent representations and inducements, whereby the present petitioner is said to have procured from the plaintiff an assignment of a complete stock-in-trade, including goods, choses in action, &c., in exchange for a note averred to be of much less value than was represented, if not wholly worthless.

The jurisdiction of this court over the subject-matter, and the pendency of the proceedings in bankruptcy, in New York, are admitted, and the question argued, is whether this is such an arrest as is prohibited by section 26 of the Bankrupt Act. And this may be divided into two questions: first, whether the declaration shows a debt which would be discharged by the certificate; and second, if not, whether evidence can be received to contradict the declaration, and to show that no such cause of action really exists as is there set out, but only a debt provable in bank-

¹ We are indebted for this case to the *Bankrupt Register*.—Eds. AM. L. R.

ruptcy, and discharged by the certificate, if any cause of action there be.

By section 19, all demands against a bankrupt, for or on account of any goods or chattels, wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest, and by a subsequent clause of the same section the court may cause such damages, if liquidated, to be assessed in such mode as it may deem best, and the sum so assessed may be proved. The declaration, in this case, is not very artificially drawn, but it seems clear that the gist of the action is the fraud and not the conversion. The facts alleged might be sufficient to show that a merely voidable title had been obtained to the property, out of which the plaintiff declares himself to have been defrauded, and if he had elected so to do, he might perhaps have avoided the sale, and have maintained trover for the goods and chattels, but he could not have done so for the book debts, and he naturally preferred to declare for his whole damages in one action, and accordingly he has not declared in trover. Another answer to this part of the case is, that trover could not be maintained, excepting upon the ground that the fraud would authorize the plaintiff to rescind the bargain and demand back the goods, and in that case the goods considered as a debt provable in bankruptcy would be one created by the fraud of the bankrupt, which, by section 33, would not be discharged by the certificate, though it would perhaps be provable. If proved, all actions must be stayed by section 21, but this debt has not been proved ; and this brings us to the main point of dispute.

The petitioner contends that he has the right to aver and prove, in reply to this return, that the allegations of fraud contained in the plaintiff's declaration are false, and that the plaintiff has no just cause of action whatever against him on the footing of a fraud.

This point is not open to the petitioner. The words of the statute are, that no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him. Now upon inspection of this writ, it appears to be founded on such a claim ; namely a claim of damages for deceit. Whether that claim is

well or ill founded, is a question which must be left to the tribunal before which the case is brought; it is impossible that I should try it on *habeas corpus*. Suppose the declaration were for damages in trespass or case, slander or assault, it is very plain that I could not inquire on *habeas corpus* whether any assault or slander had been committed; even the court before whom the case is pending could not do that. And this is admitted in argument. But how does it vary the case, that the action is founded on a fraud, which the petitioner says never was committed? If no fraud was committed, the plaintiff has no just cause of action concerning the matters declared on; but that does not show that the action is founded on a debt or claim from which the discharge in bankruptcy would release him, but only that it has no foundation whatever.

It is said that Judge BLATCHFORD has decided, that the District Court will, on *habeas corpus*, inquire into the fact of fraud, and uphold or discharge the arrest according to the result of the inquiry: *Re Kimball*, 6 Int. Rev. Record 215; *Re Glazer*, 1 Bankrupt Register 73; but in both these cases the action was founded upon a simple contract debt, which, on its face, would be provable and discharged in bankruptcy, and the *arrest* only was founded on *ex parte* affidavits of fraud.

And if I am rightly informed of the New York practice, such an arrest might be discharged by the court that ordered it, and perhaps by some other courts, upon just such a preliminary hearing as Judge BLATCHFORD granted. If so, it was of no special consequence, whether the one court or the other should undertake that investigation—both having jurisdiction of assets of bankrupts. The course taken was certainly a liberal one for the creditor, who had not in terms founded his action on the fraud; but it would seem to work equal and exact justice under the operation of the laws of arrest in New York. I am not sure, that in this district the creditor must not stand or fall on the record, on which he causes the arrest to be made. But in this case, the whole foundation of the action is the fraud, and the arrest is only an incident, not depending at all on the fraud, but on the fact that the defendant is a non-resident; and to try the question of fraud is to try not merely the validity of the arrest, but the whole case. This action is a civil action, but it is not founded on any debt, excepting in the very largest sense, certainly not on any provable

and dischargeable debt; and if every allegation in the writ be wholly false and malicious, still it is a matter with which this court has not, under this part of the law, any more concern than if the petitioner were not a bankrupt. I have no authority, in this summary mode, to relieve from imprisonment on state process persons who, whether bankrupts or not, are unjustly charged concerning matters not coming within my cognisance. What remedies there may be in such an extreme case it is not necessary to inquire.

It is strongly urged, by the provisions of statute 5th February 1867 (14 St. 385), sect. 1, that the petitioner may aver and prove any facts which tend to show that he is unjustly detained under the forms of law and under state authority, in contravention of the Constitution or laws of the United States. That statute enlarges the jurisdiction of this court, and gives me power to hear and determine this case, and it certainly intends that the return to the writ should not be conclusive, but that the real facts of the detention may be shown by evidence. But I do not understand, that it expects a judge to decide the merits of a case on *habeas corpus*. In deciding that the arrest of the petitioner is not prohibited by the Bankrupt Law, I have not decided that he is not imprisoned in contravention of the very law of the United States that has been relied on for his release.

*District Court of the United States, Eastern District of
Pennsylvania.*

IN THE MATTER OF WILLIAM LEEDS, AN ALLEGED BANKRUPT.

In deciding whether giving a warrant to confess judgment is an act of bankruptcy, the character, &c., of the alleged bankrupt's business may be taken into consideration.

A suspension of payment of commercial paper for fourteen days is not, unless fraudulent, an act of bankruptcy.

THE alleged bankrupt was a dealer in live stock. His business done through bank alone had exceeded \$500,000 per annum. His real estate, worth about \$8000, was encumbered to the amount of less than half its value. The alleged acts of bankruptcy were giving a warrant to confess judgment, and a suspension of payment of his commercial paper for fourteen days.

By the Court,

CADWALADER, J.—The case has been ably argued. The peculiar character of the business in which the alleged bankrupt was engaged, must be principally considered. He had no such stock-in-trade as would be swept away through the necessary or ordinary effect of an execution upon a judgment under a warrant of attorney. His real estate was moreover of sufficient value to constitute an available partial security for such a judgment.

The former course of his transactions also shows that the purpose of the warrant of attorney, which constitutes one of the alleged acts of bankruptcy, may probably have been to enable him to continue his business. The application of much of the evidence would, in an ordinary case, therefore, be different from its application to the case before me. After some hesitation, I have concluded, that there was neither such an intended preference, nor such an intent to defeat or delay the operation of the Bankrupt Law, as to make this warrant of attorney a sufficient ground for the adjudication asked.

The other alleged act of bankruptcy, is a suspension of payment of his commercial paper for a period of fourteen days. I am now required to decide whether, in the absence of any fraud, such a suspension is an act of bankruptcy. This question has, in some cases, been heretofore submitted to me without argument. The decisions in other districts had been, that the suspension of payment of such paper, though not fraudulent, was, if continued for this period, an act of bankruptcy. I was not prepared to make definitively such a decision. In the cases which were thus submitted without argument, I followed the decisions in the other districts; but stated on the record in every case, that the adjudication was not to be considered as a precedent. In the case now before me, the question has been argued. In the mean time the point has been decided by Judge FIELD, in the district of New Jersey (*Re The Jersey City Window-Glass Co.*, ante 419), somewhat differently from the decisions in other districts to which I have referred. My opinion is that the suspension of payment, unless fraudulent, is not an act of bankruptcy, and that in this case it does not appear to have been fraudulent.

The petition is dismissed, but without costs.

United States District Court, Northern District of New York.

RE JULIUS R. PETTIS.

A debt fraudulently contracted is not discharged by an adjudication of bankruptcy, and the Court of Bankruptcy will not therefore interfere, to prevent the creditor from enforcing his claim, by imprisonment, even during the pendency of the proceedings in bankruptcy, unless such interference be necessary to enable the court to exercise its proper authority and jurisdiction in the case.

IN this case the bankrupt applied for an order staying the issue of an execution against his body, upon a judgment obtained against him by Richard J. Connor and Charles J. Richardson, of the city of New York.

This motion was opposed, on the ground that the judgment was obtained for a debt created by the fraud of the bankrupt.

R. W. Townsend and Cornwell, for Pettis.

Ganson & Smith and B. C. Thayer, for judgment-creditors.

HALL, J.—The judgment against the petitioner, under which he anticipates arrest, appears to have been rendered upon a debt created by fraud of the bankrupt, and the 33d section of the Bankrupt Act expressly provides that no such debt shall be discharged under that act. The 26th section, which provides for the production or examination of the bankrupt in case he is imprisoned, and which provides that no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim, from which his discharge in bankruptcy would not release him, shows that he is not to be considered as absolutely privileged from arrest, and as the Court in Bankruptcy has no power to discharge the judgment, it should not interfere to prevent its enforcement by imprisonment, unless it be necessary to enable the Bankrupt Court to exercise its proper authority and jurisdiction in the case. The effect of the protection which the register is authorized to grant is not now under consideration, and the present motion is disposed of without reference to the extent of that protection, and without determining any question other than that directly in controversy.

The motion is denied, but as this is the first time the question has been presented it is without costs.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

COURT OF CHANCERY OF NEW JERSEY.¹SUPREME COURT OF VERMONT.²

APPRENTICE.

Indenture valid where made—Legacy to—Equity—Setting aside Assets for Debt not yet due.—A court of equity has power in cases where there is a clear debt or duty to be paid or performed by the testator or his executors at a future day, to order that sufficient assets for the discharge of it be retained and secured by the executor before distribution of the estate. There is no adequate remedy at law in such a case, and the creditor ought not to be left to follow the legatees, or resort to the refunding bonds for the share of each: *Petrie v. Voorhees' Executor and Others*, 3 C. E. Green.

An indenture of apprenticeship with covenants, valid in the state where executed, will be enforced in the courts of this state, if not *contra bonos mores*, or against the policy of our law. The personal status of each individual is governed by the law of actual domicile: *Id.*

In general, executors are bound by all covenants of the testator except such as must be performed by him in person: *Id.*

In a contract of apprenticeship the covenant to support must be limited to the time of service, and cease when that ends. But the principle must be settled at law, and unless the right is so settled the aid of this court cannot be extended to prevent the distribution of the master's estate to protect a doubtful claim: *Id.*

To bar a claim against an estate under the rule of the surrogate, limiting creditors (Nix. Dig. 589, § 70), there must be proof that the notice was advertised or set up as required by law: *Id.*

A provision made by a master in his will for the support of his apprentice, if liberal, according to his circumstances and her condition, must be taken to be a satisfaction of his obligation to support her: *Id.*

BAILMENT.

Negligence.—Money deposited for the sole benefit of the bailor, without any special undertaking, on the part of the bailor, and without expectation of reward, constitutes a simple *depositum*. In a bailment of this character, the bailor is bound to exercise only slight diligence, and is responsible only for gross neglect: *Spooner v. Mattoon*, 40 Vt.

The plaintiff and the defendant were soldiers in camp, occupying tents ten rods apart. The plaintiff had considerable money, and fearing it might not be safe with him, had left it with the defendant, his friend, without expectation of reward, for safe keeping, for two nights, and called for it in the morning. The third night he so left it, but did not call for it in the morning, and the defendant being desirous of relieving himself of the care of it, started, before going upon duty, for the tent of the plaintiff, with the intention of returning it to him. For the purpose of not

¹ From C. E. Green, Esq., Reporter; to appear in Vol. 3 of his Reports.

² From W. G. Veazey, Esq., Reporter; to appear in 40 Vt. Reports.

exposing the pocket-book containing the money to view, having no pocket large enough to contain it, he placed it between his shirt and vest, intending to keep it secure by the pressure of his arm upon it. On the way, his attention was diverted, and the pocket-book slipped out, and was lost. The County Court excluded the inference that the defendant embezzled the money. *Held*, that the defendant was not guilty of gross negligence: *Id.*

BILLS AND NOTES.

Want of Consideration—Jurisdiction of Equity to order Note cancelled.—The general rule is, that where a note is without consideration, relief cannot be had in equity on that ground merely. But where the note is negotiable and not void on its face, and, in case of a discontinuance or nonsuit, might be held until the evidence of its being without consideration could be had, and then a suit on it be brought against the administrators or the infant heir, to the amount of assets descended, a court of equity will order the security to be given up to be cancelled: *Kinney v. Mettler*, 3 C. E. Green.

CONTRACT.

Evidence—Lease—Verbal Agreement.—Where a written lease of certain premises, not under seal, for the term of one year, was produced, it was *held*, that evidence of a verbal agreement between the parties, entered into subsequent to the execution of said lease, and prior to its taking effect, by which its terms were changed, was admissible: *Flanders v. Fay*, 40 Vt.

The rule that a verbal agreement entered into between the parties to a simple contract in writing, before or at the time of the execution of such contract, is not admissible to vary or affect its construction, does not apply where it appears that the oral agreement was made subsequent to the execution of the written agreement, and was upon a new consideration: *Id.*

CORPORATION.

Railroad Company—Deed—Estate.—At common law a corporation has the legal capacity to take a title in fee to real property: *Page v. Heineberg*, 40 Vt.

The statutes of mortmain have never been adopted in this state, so that the common-law right to take an estate in fee, incident to a corporation, is unlimited, except by its charter and by statute: *Id.*

The Vermont Central Railroad Company acquired title to certain land in this state by warranty deeds, in the usual form, which land they subsequently abandoned for railroad purposes, having changed the location of their road-bed. *Held*, that the land did not revert, by reason of such abandonment, but that the railroad company, by said deeds, acquired a title in fee to the same: *Id.*

CUSTOM.

Scire Facias—Evidence—Recognisance.—The custom of attorneys, in a certain place, to direct sheriffs as to whom they shall take as receptors for property attached on writs made by them, is not admissible in evidence as having a tendency to show that an attorney of that place who commenced and conducted a certain suit, directed the sheriff serving

the writ, whom to take as receptors : *Hine v. Pomeroy and Others*, 40 Vt.

Sec. 73, ch. 30, Gen. Stat., construed literally as to time when the action therein provided, directly upon the recognisance of a sheriff, may be brought. The right of action being held to exist *whenever* the liability of the sheriff and inability to serve process upon him concur : *Id.*

EASEMENT.

Creation by severance of Estate.—Where the owner of lands devised the same in two parcels, one to A. and the other to B., the fact that he was accustomed in his lifetime to use an alley upon the lands devised to B. as a means of egress from his stable, upon the land devised to A., to the street, will not create an easement in B.'s land in favor of A., he being able to construct a way over the parcel devised to him, from the stable to the street, and such easement, therefore, not being *necessary* to the beneficial enjoyment of his land : *Felters v. Humphreys*, 3 C. E. Green.

Discontinuous easements not constantly apparent are continued, or created by a severance, only where they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises : *Id.*

The leading cases examined and commented upon : *Id.*

EQUITY.

Jurisdiction and Practice.—A suit in equity may be sustained to ascertain the height to which the owner of a dam is entitled to flow back water upon the lands above the dam : *Carlisle v. Cooper*, 3 C. E. Green.

Where upon the hearing, the evidence as to the facts in controversy is entirely satisfactory, the court will not order an issue, or wait for the result of a trial at law before making a decree. Nor will it on the hearing refuse relief because the complainant has delayed his suit, if it is clear, upon the evidence, that he ought to have the relief : *Id.*

A bill will not be dismissed upon motion of the defendant, after answer filed, where the court cannot adjudge that under the bill the complainant will not be entitled to relief at the hearing upon any evidence that he can offer : *Id.*

A suitor cannot be compelled to elect between a suit in equity to prevent future injury, and a suit pending at law to recover damages for past injury : *Id.*

A suit in equity cannot be delayed until the determination of a suit at law, where it is for a different object : *Id.*

FRAUDS, STATUTE OF.

Resulting Trust not within.—The Statute of Frauds is a good defence except in the case of a resulting trust arising by implication of law and of actual fraud : *Eliza Brannin and Others v. Thomas Brannin*, 3 C. E. Green.

Where a defendant in execution, or the heirs of a decedent, rely on the promise of some one to buy the property for their benefit, at the sale under the execution, and in consequence neglect to attend the sale,

or bid for the property, and the person trusted buys for his own benefit, a court of equity will hold such person a trustee, notwithstanding the Statute of Frauds: *Id.*

The application of the principle cannot be invoked in this case: *Id.*

HUSBAND AND WIFE.

Married Infant.—The power of a guardian over the person and property of an infant ceases at her marriage. From that time such guardianship devolves upon the husband. He can enter upon her property and permit others to enter upon it, without committing a trespass; he can also make leases voidable by her upon his death, or by her heirs at her death: *Porch and Others v. Fries and Others*, 3 C. E. Green.

An acknowledgment by a married infant is void: *Id.*

The husband of a married infant cannot sell or dispose of the growing wood or timber on the real estate of his wife: *Id.*

The deed of a married infant is void when it attempts to convey the wood and timber separately, as when it attempts to convey the soil with them standing upon it: *Id.*

By the Married Woman's Act (Nix. Dig. 503), in cases coming within the provisions of that act, the husband has, during her life, no interest or estate in the lands of his wife. She can sell them with his assent, and if she so sells and conveys them, she conveys them free from any interest or estate of her husband: *Id.*

That act destroyed the estate of tenancy by the curtesy initiate: *Id.*

The Married Woman's Act, although inconsistent with the estate by curtesy initiate, does not defeat the husband's curtesy at the death of the wife, provided she has not aliened her estate before. The act only protects her estate during her life; it does not, at her death, affect the law of succession as to real or personal estate: *Id.*

Neither a husband nor his lessees may commit waste upon lands in which he has only an estate by the curtesy: *Id.*

A lease made by the husband of a married infant of her lands, becomes valid for his life by the vesting of the estate by curtesy; and the heirs at law, being entitled to the reversion, have such privity of estate as will enable them to call the life tenant and his lessees to account for wood and timber cut as well during the life as after the death of the infant: *Id.*

Where the husband of a married infant permits the felling of trees upon her land, or severing any part of her realty, and so the change of the real to personal property for his own benefit, it will retain its character of real property so as to pass to those who would have been entitled to it if not severed: *Id.*

The heirs at law are entitled to an account for so much of the timber as has been taken away, and an injunction to restrain the removal of so much as still remains on the land: *Id.*

Wife as Witness.—The peculiar relations of husband and wife will not protect her from making a discovery relating solely to her own conduct and affecting only her own interests. In such case she may, under the recent acts, even be compelled to testify against herself: *Kinney, Adm'r., v. Mettler*, 3 C. E. Green.

INFANT. See *Husband and Wife*.

Custody of.—The father is entitled to the custody of his children; and in no case will the courts take them away from him when he has them in his custody, fairly obtained, except where the father, from notorious grossly immoral conduct, or great impurity of life with which his children come in contact, so as to be in danger of contamination, is an improper person to have the custody of his own children. Infants under seven years of age are an exception, under the Act of March 20th 1860, Pamph. L. 437: *The State, ex rel. Baird, v. Baird*, 3 C. E. Green.

Upon a *habeas corpus*, brought by the father for his children, the court will not, as a matter of course, order them to be delivered up to him, but only in case they are improperly restrained of their liberty. The office of the writ is not to recover the possession of the persons detained, but to free them from all illegal restraints upon their liberty: *Id.*

If the infants are of sufficient years or discretion to judge for themselves, they will be examined, and if they are satisfied and wish to remain, the court will hold that they are not unduly deprived of their liberty, and will permit them to go with which of the parties they may elect: *Id.*

When infants are too young to exercise any discretion, the court will determine for them, and adjudge the custody to such of the parties as may be considered most advantageous to the infant: *Id.*

All the children were adjudged to remain in the custody of the mother: the two youngest because under seven years of age, and the mother a fit person to have the custody of them; the four eldest because, upon examination, they proved not to be restrained by their mother, those capable of making their election preferring to remain with her; and in the case of those not so capable, because it was adjudged to be for their benefit and advantage to be brought up with the others: *Id.*

INJUNCTION.

Against Trespass.—In general, a trespass will not be restrained by injunction; but where the trespass is an obstruction to a public highway, entitled to be used by all citizens, it is a nuisance of a character which the court will prevent by injunction: *The Morris Canal Co. v. Fagan and Others*, 3 C. E. Green.

The denial of the answer being fully responsive to the allegations of the bill upon which the injunction was granted, and supported by affidavits, injunction dissolved: *Id.*

LUNATIC.

Second Inquisition—Imbecility from Great Age.—This court can and will order a second inquisition of lunacy, either when the first is irregular or unsatisfactory from the finding being against evidence, or by a mistake of the jury as to their duty. Or it will order a second inquisition at some time after the first, if it appears that there is an evident change in the condition of the subject: *Matter of Collins*, 3 C. E. Green.

The substitution of a new commissioner for one appointed by the chancellor, without his approval or confirmation, and no one of the com-

missioners being a master of the court, is such an irregularity as would set aside the inquisition, if urged for that purpose, at or before the motion for confirmation, but would be without effect upon the argument of a rule to show cause why a commission should not issue: *Id.*

Imbecility for which a commission will issue, must amount to unsoundness of mind: *Id.*

The presumption of law is not against the soundness of mind of a person one hundred years of age: *Id.*

Where unsoundness of mind is proved and the question is as to the degree of it, and it appears that the subject never had any property to control until the issuing of the commission, the court and inquest would and should look at the value and importance of the property to be controlled by her, and also to the persons by whom she is surrounded and their conduct: *Id.*

MUNICIPAL CORPORATION.

Dedication of Streets—Map or Plan of Land with new Streets.—If the owner of a tract of land lays it out in lots and streets by a map publicly exhibited or filed in the proper public office, and sells lots laid out on said map by a reference thereto, he thereby dedicates to the public those streets on said map along which lots have been sold. Such dedication does not make them public streets or highways until the proper municipal authorities have accepted them as such, or in some way ratified the dedication: *Pope v. The Town of Union*, 3 C. E. Green.

The proper municipal authorities charged with laying out and maintaining streets, have the right, on the part of the public, to take and appropriate the lands so dedicated for the purpose for which they were dedicated, and to grade and construct streets and highways upon them without further compensation, or, in cases where it is required, to vest the title in the public upon a nominal consideration: *Id.*

The map or conveyance may qualify the dedication. But laying out land in lots and streets, clearly marked as such, and selling lots bounded on such streets, without any qualification, must be held as an absolute dedication: *Id.*

An intention to qualify the dedication concealed within the breast of the owner, or not expressed in some way on the map or in the conveyances, cannot be regarded: *Id.*

Whether a contemplated street would not be unwise and injudicious, and even if it would be productive of great injury to private property, cannot be considered by this court. It is a matter exclusively within the province of the municipal authorities: *Id.*

Whether the proceedings of municipal authorities have been according to law is within the jurisdiction of the courts of law: *Id.*

NE EXEAT.

Practice in regard to.—The writ of *ne exeat* will issue only for an equitable demand, and an action for an account is an equitable demand for which it will issue: *MacDonough v. Gaynor*, 3 C. E. Green.

It must appear by positive proof that there is a certain sum actually due, except in account, when the proof must show some sum due, the amount of which may be sworn to according to belief: *Id.*

The writ will be issued against a non-resident temporarily here, even if not in the state at the time, and it is not necessary that it should appear he is about to depart to avoid the jurisdiction, if his departure will defeat the suit: *Id.*

If the writ is served no *subpoena* is necessary, and the party cannot be discharged upon affidavit, but must make answer: *Id.*

In cases where the court feels constrained to discharge the writ, it will often require security to abide the decree: *Id.*

A *capias* where a *ne exeat* should have been sued out, and a bond taken thereon simply to appear at court in the cause on the first day of the next term, are irregular and will be set aside; but the order being right, the defendants ordered to give bond, with security, to answer and abide the decree of the court. Upon those terms writ and bond set aside with costs: *Id.*

PARTITION.

Title of Complainant disputed.—A tenant in common has a right to partition in chancery if he shows a title to a share: *Hay v. Estell and Others*, 3 C. E. Green.

When the title of the complainant, in a bill for partition, is disputed, it will not be settled upon the hearing in this court, but the complainant will be compelled to establish his title at law first, and the bill will be retained until he can so establish his title: *Id.*

But it must appear clearly to the court that there is an actual dispute, either by direct statement, or by words that amount to a direct denial of title, and not by a mere possible inference from the pleadings and proofs: *Id.*

PLEADING.

Trespass—New Assignment.—In trespass, *quare clausum fregit*, the declaration alleged the breaking and entering, &c., and the destruction of the plaintiff's fence and gate, &c., with a *continuando*. *Held*, that the destruction of the fence and gate was not of the gist of the action, but matter of aggravation merely. Therefore, the defendant's plea was held good on general demurrer, in which he pleaded in defence, a public right of way, and that having occasion to use it, when, &c., he entered the *locus in quo* for that purpose, which were the trespasses mentioned, &c., without referring to the fence and gate: *Groat v. Knapp*, 40 Vt.

As the declaration admitted of the construction, either that the matter unanswered by the plea was insisted and relied upon as aggravating the damages merely, or that it was relied upon by the plaintiff as a distinct injury, and that he intended to recover for it, the defendant was at liberty to treat it as of the former character only, and having done so, the plaintiff, to avail himself of the latter construction, should have brought such matter forward by new assignment: *Id.*

RAILROAD.

Common Carrier—Negligence—Notice.—A railway company cannot, by their printed notices, receipts, and regulations, even when brought to the notice of the shipper, so limit the responsibility that they can carry freights for a reward, and, at the same time, not be liable for a failure to exercise ordinary care in the business: *Mann and Wheeler v. Birchard and Page*, 40 Vt.

The station agent at Ludlow, on the defendants' railroad, billed the plaintiffs' goods through to Charlestown, Mass., a point upon a connecting road, and receipted the pay for "transporting the merchandise from Ludlow to Charlestown," and this was shown to be in accordance with the usual course of business upon the defendants' road. *Held*, that these facts, without further proof, constituted proper and sufficient evidence to warrant the court in submitting to the jury the question whether or not the defendants undertook to transport the goods over the connecting roads to the point of their ultimate destination: *Id.*

The burden is upon the plaintiffs to prove that the defendants failed to exercise ordinary care and diligence in carrying the goods, but unusual and unexplained delay and failure to deliver the goods according to the general course of business, is *prima facie* evidence of a want of ordinary care: *Id.*

SALE.

Warranty—Representation.—A simple representation, at the time of sale, that a lot is valuable and eligible, is but the expression of an opinion, and is never regarded as a warranty: *French v. Griffin*, 3 C. E. Green.

TRESPASS.

Fence—Charge to Jury.—In trespass *quare clausum*, for the entering of cattle, if the defendant does not defend on the ground of defect in the plaintiff's fence, it is not incumbent on the plaintiff to show that his fence was legal in order to make out his right of recovery, therefore, the charge of the court "that there being no evidence tending to show that the plaintiff's fence was not a legal fence, or satisfactory to the defendant, or that the defendant's cattle ever went on to the plaintiff's land by reason of the plaintiff not having a legal fence, the presumption is that the plaintiff's fence was legal," could work no detriment to the defendant, and was not subject to exception: *Sorenberger v. Houghton*, 40 Vt.

WARRANTY.

Covenant—Way.—An outstanding right of way, across one's premises, constitutes a breach of the covenant of warranty: *Russ v. Steele*, 40 Vt.

The occupation of the way, in such a manner as the nature of the right secures to the adjoining proprietor, as occasion may require, and for all time, is such a disturbance of the possession of the plaintiff as, in law, amounts to an eviction to the extent of the adverse right or claim: *Id.*

WILL.

Soldier's Will—Infancy—Probate Court.—An infant cannot make a valid soldier's will: *Goodell v. Pike et al.*, 40 Vt.

The probate of this will was procured at the instance of the husband of the sole legatee, with full knowledge of the alleged testator's age, which was seventeen years. It was not claimed that the Probate Court was made aware of the alleged testator's infancy. No effort was made to advise the heir at law of the proceedings, and the probate was procured before he was informed of the decease. The will was made by the infant shortly after his enlistment while with the husband of the legatee, in whose family he was residing, and who had procured himself to be

appointed the infant's guardian in order to consent to his enlistment. *Held*, that these facts were sufficient evidence that the withholding from the Probate Court of all information of the alleged testator's infancy was wilful and corrupt, and the probate procured thereby was fraudulent and invalid: *Id.*

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THE

AMERICAN LAW REGISTER.

OCTOBER, 1868.

CONVICTION UPON CIRCUMSTANTIAL EVIDENCE.

THE injustice of convicting persons of capital offences upon circumstantial evidence has been a fruitful theme of discussion time out of mind. We believe it is now generally conceded that crimes diminish in a country in proportion to the mildness of its laws. Evils certainly arise in having laws on the statute-book which are at variance with the universal instincts of mankind, and which are therefore continually evaded. The abolition of a bad law is attended with less injury to a community than its constant evasion. Heinous crimes are usually committed in secret, and the proof, therefore, is necessarily circumstantial. Evidence so precarious in its nature should indeed be closely scrutinized. In Scotland, long ago, they refused to convict of capital offences upon such evidence; and in England, since the conviction and execution of Eugene Aram—upon whose character and the circumstances of whose death, the versatile Bulwer founded a readable novel, and the gifted Hood wrote a touching poem—the courts have been prone to analyze carefully a case resting entirely upon such evidence. Aram, it will be remembered, was indicted for killing one Daniel Clarke, and was convicted of his murder by a chain of circumstantial evidence, fourteen years after Clark was missed. The *corpus delicti* was not proved. The concatenation of circumstances which led to his conviction is among the most peculiar and remarkable on record.

In the trial of capital cases there are two time-honored maxims which have always obtained. (1.) That *circumstantial evidence falls short of positive proof*: (2.) That *it is better that ten guilty persons should escape than one innocent person should suffer*. The first qualified by no restriction or limitation is not altogether true. For the conclusion that results from a concurrence of well authenticated circumstances, is always more to be depended upon than what is called positive proof in criminal matters, if unconfirmed by circumstances, i. e., the oath of a single witness, who, after all, may be influenced by prejudice, or mistaken; and if by the word "better," in the second maxim, is meant more conducive to general utility, it would also seem to be unsound. And here we may endeavor to ascertain clearly what is understood in legal parlance by "circumstantial evidence." It may be observed that, every conclusion of the judgment, whatever may be its subject, is the result of evidence, a word which (derived from words in the dead languages signifying "to see," "to know,") by a natural sequence is applied to denote the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved; circumstantial evidence is of a nature identical with direct evidence, the distinction being, that by direct evidence is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum*: circumstantial evidence is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts, incidental to or usually connected with some other fact as its accident, and from which such other fact is inferred. Upon this general definition jurists substantially agree. For an illustration, then, of direct and indirect evidence, let us take a simple example. A witness deposes that he saw A. inflict a wound on B., from which cause B. instantly died; this is a case of direct evidence. C. dies of poison, D. is proved to have had malice against him, and to have purchased poison wrapped in a particular paper, which paper is found in a secret drawer of D., but the poison gone. The evidence of these facts is direct, the facts themselves are indirect and circumstantial, as applicable to the inquiry whether a murder has been committed and whether it was committed by D. The judgment in such a case is essentially deductive and inferential. A distinguished statesman and orator (Burke's Works, vol. II., p. 624), has advanced the unqualified

proposition that when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof. At one time great injustice was done by condemning persons for murder when it had not been proved that a murder was perpetrated. The now well-recognised principle in jurisprudence that no murder can be held as having been committed till the body of the deceased has been found, has terminated this form of legal oppression. A common cause of injustice in trials for murder is the prevarication of the party charged. Finding himself, though innocent, placed in a very suspicious predicament, he invents a story in his defence, and the deceit being discovered, he is at once presumed guilty. Sir Edward Coke mentions a melancholy case of a gentleman charged with having made away with his niece. Though he was innocent, in a state of trepidation he put forward another child as the one said to have been destroyed. The trick being discovered, the poor man was executed, a victim of his own disingenuousness.¹

¹ The following case occurred in Edinburgh (*vide* 2 Chambers' Miscellany).

Catherine Shaw encouraged the addresses of John Lawson, which were insuperably objected to by her father, who urged her to receive the addresses of one Robertson. One evening being very urgent with her thereon she peremptorily refused, declaring she preferred death to being Robertson's wife. The father became enraged, the daughter more positive, so that the words "barbarity, cruelty, and death," were frequently pronounced by the daughter. He locked her in the room and passed out. Many buildings in Edinburgh are divided into flats or floors, and Shaw resided in one of these flats, a partition only dividing his dwelling from that of one Morrison. Morrison had overheard the quarrel, and was impressed with the repetition of the above words, Catherine having pronounced them emphatically. For some little time after Shaw had gone out all was quiet: presently Morrison heard groans from Catherine. Alarmed, he ran to his neighbor, who entered Morrison's room with him and listened, when they not only heard groans, but distinctly heard Catherine murmur, "Cruel father, thou art the cause of my death." They at once hurried to Shaw's apartment, knocked but received no answer, and repeated the knocks, but no response came. A constable was procured, and an entrance forced, when Catherine was found weltering in her blood, a knife by her side. She was alive, but unable to speak, and on being questioned as to owing her death to her father, was only able to make a motion with her head, apparently in the affirmative, and expired. At this critical moment Shaw entered the room; seeing his neighbors and a constable in his room he appeared much disordered, but at the sight of his daughter, turned pale, trembled, and was ready to sink. The first surprise and succeeding horror left little doubt of his guilt in the breasts of the beholders; and even that little was removed when the constable discovered blood upon the shirt of Shaw. Upon a preliminary hearing he was committed. On his trial he acknowledged having confined his daughter to prevent her

The rules of evidence and the practical principles of jurisprudence have been methodized by a succession of wise men, as the

intercourse with Lawson ; that he had frequently insisted on her marrying Robertson ; and that he had quarrelled with her on the subject the evening she was found murdered, as the witness Morrison had deposed ; but averred he left her unharmed, and that the blood found on his shirt was there in consequence of his having bled himself some days before, and the bandage becoming untied. These assertions did not weigh a feather with the jury in opposition to the strong circumstantial evidence of the daughter's expressions of " barbarity, cruelty, death," together with that apparently affirmative motion with her head, and of the blood so seemingly providentially discovered on Shaw's shirt. On these concurring circumstances Shaw was found guilty, and executed at Leith Walk. Was there a person in Edinburgh who believed the father guiltless ? No, not one, notwithstanding his latest words, at the gallows, " I am innocent of my daughter's murder." A few months afterwards, as a man, who had become the possessor of the late Shaw's apartments, was rummaging, by chance, in the chamber where Catherine died, he accidentally perceived a paper which had fallen into a cavity on one side of the chimney. It was folded as a letter, which on opening contained the following :—

" Barbarous father, your cruelty in having put it out of my power ever to join my fate to that of the only man I could love, and tyrannically insisting upon my marrying one whom I always hated, has made me form a resolution to put an end to an existence which is become a burden to me. I doubt not I shall find mercy in another world, for sure no benevolent Being can require that I should any longer live in torment to myself in this. My death I lay to your charge ; when you read this, consider yourself as the inhuman wretch that plunged the murderous knife into the bosom of the unhappy

CATHERINE SHAW."

A few years ago a poor German came to New York, and took lodgings, where he was allowed to do his cooking in the same room with the family. The husband and wife lived in a perpetual quarrel. One day the German came into the kitchen with a clasp-knife and a pan of potatoes, and began to pare them for his dinner. The quarrelsome couple were in a more violent altercation than usual ; but he sat with his back towards them, and being ignorant of their language, felt in no danger of being involved in their disputes. But the woman, with a sudden and unexpected movement, snatched the knife from his hand and plunged it in her husband's heart. She had sufficient presence of mind to rush into the street and scream " murder." The poor foreigner in the meanwhile, seeing the wounded man reel, sprang forward to catch him in his arms, and drew out the knife. People from the street crowded in, and found him with the dying man in his arms, the knife in his hand, and blood upon his clothes. The wicked woman swore in the most positive terms that he had been fighting with her husband, and had stabbed him with that knife. The unfortunate German knew too little English to understand her accusation, or to tell his own story. He was dragged off to prison, and the true state of the case was made known through an interpreter ; but it was not believed. Circumstantial evidence was exceedingly strong against the accused, and the real criminal swore unhesitatingly that she saw him commit the murder. He was executed, notwithstanding the most persevering efforts of his counsel, John Anthon, Esq., whose convictions of the man's innocence were so painfully strong, that from that day he refused to have any connection with a capital case. Some

best means of discriminating between truth and error. Having their origin in man's nature, as an intellectual and moral being ;

years after this tragic event the woman died, and on her death-bed confessed her agency in the diabolical transaction.

One of the most remarkable cases of conviction upon circumstantial evidence that has occurred in this country, is that of one Ratzky, who was tried and convicted in 1863, at the Oyer and Terminer in Brooklyn, N. Y. The case is known as the "Diamond Murder," and the circumstances of the case were in brief as follows :—

Ratzky boarded at a house in Carrol street in said city, where one Fellner also boarded, who had a short time before come from Mentz, Germany. Fellner was about fifty years of age, had been a large dealer in diamonds in his native place, but, as shown, he had for certain causes absconded and fled to this country. On his passage over he became enamored of one Miss Pflum, who was in company with her sister, a Mrs. Marks. On his trip over his gallantry and attentions gained for him, from the passengers, the appellation of "Don Juan," and Miss Pflum that of "Zerlina." Arriving at New York the two ladies engaged rooms at a house in East Broadway, and it was shown on the trial that their characters were not the most exemplary.

On Friday morning, a few days after Fellner had commenced to board in Carrol street, Ratzky and he went to New York together. Fellner never returned to the house. His body was found washed ashore at Applegate Landing, near Middletown, N. J., four days after. On examination of the body it was found that the deceased had been murdered, there being twenty-one wounds on his breast. The body was identified by one Mrs. Schwenger, who boarded in the same house where Ratzky and Fellner had boarded. Ratzky fled under an assumed name, but was arrested in St. Louis, and finally brought to trial. His story of the affair is, in short, that, on the evening of the morning when he went to New York with Fellner, they called at the house where Mrs. Marks and Miss Pflum were. That Fellner and Miss Pflum were engaged in conversation for an hour, and that during the evening Fellner gave him a gold watch which Miss Pflum handed him from a jewel case belonging to Fellner. It was a little after 8 o'clock that evening when Ratzky informed Fellner that it was about time for them to go home. That he urged Fellner several times to go, but he and Miss Pflum were engaged in a lively conversation, and that at last upon further urging Fellner rose to go, kissed Miss Pflum with great *nonchalance* before those present, telling her that to-morrow he should leave for Chicago, and desiring her to answer his first letter from there. He embraced Miss Pflum, at the same time whispering something in her ear. They then left—arriving at the ferry, no boat was in, and they sat down on the cross-beam of the ferry dock ; that Fellner took off his hat and wiped the perspiration from his forehead, at the same time handing his cane to Ratzky. When the boat came they went on board, he, Ratzky, still retaining the cane. In a moment or two Fellner rose from his seat and walked up and down the cabin once or twice, then went on the deck, as Ratzky supposed, for the sake of breathing the cool air ; that the boat shortly after started, and if Ratzky's story be true, he never after saw Fellner alive. That he waited for him to come off the boat when it reached Brooklyn side, but not seeing him asked the ferry-master if he had seen a man pass answering the description given. That he called out the name of Fellner at the top of his voice in order to find him, but concluded that he had gone home.

and founded (as an eloquent advocate has said) in the charities of religion, in the philosophy of nature, in the rules of history, and in the experience of common life: 29 St. Tr. 966.

If this story had been confirmed Ratzky would doubtless have been acquitted. It appeared on the trial that when the body was found Mrs. Schwenzer proposed to go and see it, when Ratzky endeavored to dissuade her from doing so. She visited Mrs. Marks, at Ratzky's request, who begged her not to say anything about the matter, giving her at the same time a sum of money to secure her silence. Ratzky soon after left the city. Fellner's body being identified, Mrs. Marks and Miss Pfum were arrested on suspicion as being *particeps criminis*. Miss Pfum committed suicide by hanging herself in the cell of a New York station-house a few days after her arrest.

(Webster, in his elaborate argument in the Knapp Case, declared that "suicide is confession.")

On the trial the prosecution argued upon the theory that Fellner and Ratzky crossed on the Hamilton Avenue ferry-boat to Brooklyn; that Ratzky induced Fellner to go to the club-house, which stands near the water at the foot of Court street, in order to get drinks; that they had been there before, and that Ratzky having got him there he inflicted the stabs and dragged the body to the water's edge or into the water, and from that point Fellner's body floated into the bay and finally was thrown ashore four days after on the Jersey side. It was shown that Ratzky reached home the night in question at 10 o'clock, that he was heated when he got home, and had Fellner's cane and a parcel belonging to him in his possession; that he inquired if Fellner had come, and on being answered in the negative, he told the story as above. To some in the house he said that Fellner had gone to Chicago. The prosecution argued that Ratzky was the last person with Fellner; that he knew he had wealth—a motive for murder; that Fellner's disappearance on the ferry-boat was wholly irreconcilable with Ratzky's subsequent conduct. If he had mentioned the fact to the ferryman that he had missed Fellner on the boat, why is not the ferryman produced? If Ratzky did not know that Fellner had been made away with, would he have had his trunk broken open next morning and taken his clothes, while making no effort to avoid the risk he ran in case of Fellner's return? Do honest men break into trunks, tell conflicting stories, try to keep dead bodies from being identified, run away, assume disguises, and change their name?

The prosecution examined witnesses on the stand who swore that under a conjunction of favorable circumstances a body thrown into the water on Brooklyn side might float to Jersey shore. But four days had elapsed from the night on which the murder was committed, according to the prosecution, until the body was found. It was not decomposed when found; on the contrary, the blood came from the wounds when probed. It is generally known that a dead body will sink when thrown into the water, and will not rise until decomposition sets in and gases are generated to float it to the surface. The theory is, that it could not have floated, and if not, it was impossible that it could have been carried by the tide from Brooklyn to the Jersey shore. No witnesses were called in behalf of Ratzky, and the jury, after a consultation of fifteen minutes, returned a verdict of guilty. By the law of 1860, a person convicted of murder in the first degree must be confined in the state prison one year, and at the expiration of that time, the governor might

The rules as laid down by Wills on Cir. Ev., other writers on the subject have repeated, and are as follows:—

(1.) The circumstances alleged as the basis of any legal inference must be strictly and indubitably connected with the *factum probandum*.

(2.) *The onus probandi* is on the party who asserts the existence of any fact which infers legal accountability: 1 Starkie's L. of Ev. 162; 1 Greenl. L. of Ev. c. 3.

(3.) In all cases, whether by direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits.

(4.) In order to justify the inference of legal guilt from circumstantial evidence, the discovery of the body necessarily affords the best evidence of the fact of death, of the identity of the individual, and most frequently also of the cause of the death. A conviction for murder, therefore, is never permitted in our day unless the body has been found, or there is equivalent proof of death by evidence leading directly to that result. The evidence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This is a fundamental rule, the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated.

(5.) If there be any reasonable doubt as to the certainty of the connection of the circumstances with the *factum probandum*; as to the completeness of the proof of the *corpus delicti*; or as to the proper conclusion to be drawn from the evidence, it is safer to err in acquitting than in convicting. This rule follows irresistibly as a deduction from the consideration of the numerous fallacies necessarily incidental to the formation of the judgment on indirect evidence and contingent probabilities, and from the

order the death penalty to be enforced. By throwing the *onus* of enforcing the penalty on the governor, it was anticipated that the death penalty would be virtually abolished in the state. This law was in force when the murder was committed, but was repealed in 1862; Ratzky was convicted in 1863, and Judge Brown sentenced him to be hanged under the law then in force. On appeal, a new trial was denied, and it was further held, that the court erred in sentencing Ratzky under a law not on the statute-book when the murder was committed. Ratzky was, therefore, sent back for a re-sentence, and under the law of 1860, he is now in prison at the pleasure of the governor of the state, who may execute the sentence at any time, though an effort is being made to have him relieved.

impossibility in all cases of drawing the line between moral certainty and doubt. It has been truly said (Burnett on the C. L. of Scotland, p. 524) that, though in most cases of circumstantial evidence there is a possibility that the prisoner may be innocent, the same often holds in cases of direct evidence, where witnesses may err as to the identity of a person, or corruptly falsify, for reasons that are at the time unknown. As we have seen, the testimony of the senses cannot be implicitly depended upon, even where the veracity of the witness is unquestionable. As, where Sir Thomas Davenport, an eminent barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men, whom he charged with robbing him in the open daylight. But they positively proved *an alibi*, and the men were acquitted: *Rex v. Wood and Brown*, 28 State Trials, p. 819; Annual Register 1784. Many of the cases where conviction was had upon evidence which was indirect or circumstantial, illustrate the assertion of Burke, that circumstantial evidence is often more reliable and positive than direct proof. Capital crimes are so rarely committed under circumstances which lead to positive unequivocal evidence of them, that presumptions are necessarily founded upon the connection with certain facts. So when the one is proved to have occurred the others are presumed to accompany them. Some presumptions of nature are so cogent and irresistible, that the law adopts them as *presumptiones juris et de jure*. The question whether parties in criminal prosecutions ought to be allowed to testify in their own behalf has elicited much discussion during the past five years, and some states, Massachusetts and Maine among the number, have passed enactments allowing parties arraigned for capital offences to testify. Few know how numerous are the cases where it has subsequently been discovered that the innocent suffered instead of the guilty. One such case in an age is enough to make legislators pause before giving a vote against the abolition of capital punishment. But some may say the Old Testament requires blood for blood. So it requires that women should be put to death for adultery, and men for doing work on the Sabbath, and children for cursing their parents; and "If an ox were to push with his horn, in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death." The commands

given to the Jews in the old dispensation do not form the basis of any legal code in Christendom, and to select one commandment and leave the others out is manifestly absurd. It is to be hoped that, not alone from the chance of condemning a wrong party, but from general motives of humanity, and a consideration of the utter uselessness of public executions in the way of example, capital punishment will ere long be numbered among the extinct barbarisms, and other and more rational means adopted for maintaining the integrity of the law and the peace of society.

J. F. B.

Supreme Court of Pennsylvania.

ANN KLINE v. SAMUEL KLINE ET AL.

An ante-nuptial contract between husband and wife, in respect to the disposition and enjoyment of their respective estates, is one in which both parties should exhibit the utmost good faith; and any designed and material concealment ought to avoid the contract at the will of the injured party.

THIS was a writ of error to the Common Pleas of *Montgomery county*.

In the court below it was an issue directed to try the validity of a certain writing, called an ante-nuptial contract, made between Gabriel Kline and Ann Hendricks.

The plaintiff in error is one of the parties to the agreement, and is the widow of said Gabriel Kline, who died in the year 1867. His widow claimed her share of his estate. Her demand was opposed by the children of decedent, and an ante-nuptial agreement, dated March 21st 1850, presented as a bar to her claim.

This agreement was made under the following circumstances: Ann Kline, then Ann Hendricks, was employed by the decedent, after the death of his first wife, as housekeeper. Shortly after her assumption of this position, the decedent proposed to marry her, and was accepted. The decedent then called alone upon a justice of the peace, living in the vicinity, and employed him to write what he called a "marriage agreement." After it was written, the justice and decedent went over to decedent's house, where Ann Hendricks, his intended wife, was. The agreement

did not show that Kline owned any property but the house he lived in, worth about \$800, but his real and personal estate was then worth at least \$12,000. The instrument was read to her in English (she being entirely unable to speak or understand the language), and parts of it were then translated to her in German. She executed the paper, confiding altogether in the honesty and integrity of her intended husband. Nothing was said to her as to the property owned by him, nor as to what her rights would be as his widow. She was not told, and did not know, that her separate property would be her own as fully after marriage as before. She executed the paper by making her mark, being unable either to read or write. They were married at once, and lived together as man and wife from that day until the death of the husband.

By the agreement, the widow was only entitled to the household goods which constituted her own separate estate before her marriage, "the use of the north end of the dwelling-house so long as she remains my widow," "kitchen on first floor, one room and entry on second floor, half of the garden, and water out of the well," "also forty dollars per year during her natural life."

The decedent's estate amounted to about \$17,000.

On the trial it was contended by plaintiff in error that a confidential relation existed between Gabriel Kline and her, and that it was incumbent on the defendants in error to show that Gabriel Kline fully informed her of the amount and extent of the property owned by him before the execution of the agreement.

This the presiding judge negatived, and charged that "the woman was bound to exercise her judgment and take advantage of the opportunity that existed to obtain information; if she did not do so, it was her own fault. The parties were dealing at arm's length. He was not bound to disclose to her the amount or value of his property."

This charge was assigned for error.

G. R. Fox and *C. Hunsicker*, for plaintiff in error.

B. M. Boyer and *D. H. Mulvany*, for defendants in error.

The opinion of the court was delivered by

SHARSWOOD, J.—Upon a question arising in the Orphans'

Court as to the right of the widow of Gabriel Kline to any share of his estate, an issue was directed to try the validity of an ante-nuptial contract between her and the intestate, dated March 21st 1850, by which it seems to have been assumed that she had by anticipation renounced or released all her rights as widow. Whether the instrument does bear that meaning is a question which does not arise on this record, has not been argued, and upon it, we desire to be understood, there is no opinion either expressed or to be implied in the judgment we now enter. The deed was executed by the parties a very short time before their marriage, and it was alleged on behalf of the widow that the circumstances of her intended husband were concealed from her and misrepresented in the writing itself, in consequence of which she was induced for a very inadequate consideration to subscribe it. Evidence tending to show this was given. It was contended on her part that it was incumbent on the plaintiffs in the issue to show that Gabriel Kline fully informed her of the amount and extent of the property owned by him. Had the judge contented himself with giving a simple negative to this proposition, it would perhaps have been unexceptionable. But his charge was much broader, for he instructed the jury that "the woman was bound to exercise her judgment and take advantage of the opportunity that existed to obtain information; if she did not do so, it was her own fault. The parties were dealing at arm's length. He was not bound to disclose to her the amount or value of his property." This part of the charge was excepted to, and is assigned for error.

There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arm's length, we think is a mistake. Surely when a man and woman are on the eve of marriage, and it is proposed between them, as in this instance, to enter into an ante-nuptial contract upon the subject of "the enjoyment and disposition of their respective estates," it is the duty of each to be frank and unreserved in the disclosure of all

circumstances materially bearing on the contemplated agreement. It may perhaps be presumed in the first instance that such disclosure was made, but any designed and material concealment ought to avoid the contract at the will of the party who has been injured. Neither Judge Story, nor any other elementary writer, has pretended to give an exhaustive catalogue of those confidential relations which require the utmost good faith (*uberrima fides*) in all transactions between the parties: 1 Story's Eq. § 215. That distinguished jurist, in commenting upon the class of cases in which secret and underhand agreements, in fraud of marital rights, have been relieved against in equity, remarks, that while they are meditated frauds on innocent parties, and upon that account properly held invalid, yet that the doctrine has "a higher foundation, in the security which it is designed to throw round the contract of marriage, by placing all parties upon the basis of good faith, mutual confidence, and equality of condition:" 1 Story's Eq. § 267.

If, indeed, this agreement was intended to debar the wife of all future right to any share of her husband's estate in case she survived him, it was a most unequal and unjust bargain. It holds out the idea in the recital that his only property was the house and lot he then occupied, while the jury might have inferred from the evidence that he was worth at that time ten times its value. It bestows on her a portion of the house for life, with her own household goods which she owned before marriage, and the small annuity of \$40 a year, or about eleven cents a day, to feed and clothe her, to find medical attendance and nursing for her when sick, and to bury her decently when she died. If, as has happened, she should find herself a solitary widow, without children, at the advanced age of seventy, such a pittance leaves her to be an object of private charity or public relief. To say that she was bound when the contract was proposed to exercise her judgment, that she ought to have taken advantage of the opportunity that existed to obtain information, and that if she did not do so it was her own fault, is to suggest what would be revolting to all the better feelings of woman's nature. To have instituted inquiries into the property and fortune of her betrothed would have indicated that she was actuated by selfish and interested motives. She shrank back from the thought of asking a single question. She executed the paper without hesitation and

without inquiry. She believed that he would propose nothing but what was just, and she had a right to exercise that confidence. She lived with him seventeen years, for aught that appears, as an affectionate and faithful helpmeet, and no doubt largely assisted in accumulating the fortune, at least of \$15,000, of which he died in possession according to the evidence. We think there was error in the charge, and accordingly

Judgment reversed, and *venire facias de novo* awarded.

Supreme Court of Pennsylvania.

CHRISTIAN KOENIG v. ANNA R. SMITH.

A trust created before the Act of 1848 to protect a married woman's property from her husband, to determine in case she *survives* him, is determined by a divorce *a vinculo*.

THIS was a petition, filed by Anna R. Smith in the Orphans' Court of Berks county, to compel the plaintiff in error, who was her trustee under the will of her father, to file an account and pay over the funds in his hands.

By his will, made in 1845, the father of the appellee made provision for the conversion of all his personal estate into money, and for the disposition of all his realty, at certain stipulated prices. He then directed that the proceeds of all his real and personal estate should be equally divided among all his children, or their heirs, except that his daughter Nancy, the appellee, should receive \$200 less than either of the others. But as she was then intermarried with Thomas Smith, in view of her coverture the testator added the following: "I authorize and empower Christian Koenig, of Bern township, as trustee over all the full share and legacy and property which I may give unto my daughter Nancy. And I do hereby give and bequeath into the hands of said trustee, for the use and benefit of my said daughter Nancy and her children, the house and lot situate opposite Darrah & Young's steam-mill, in Maiden Creek township, Berks county, which I bought at sheriff's sale, which property shall be put unto her for the same as it cost me, and the balance of her legacy shall be put on interest for my said daughter, and the interest is to be

paid to her every year during her life, and after her decease, the house and lot of ground, and the principal sum or balance of her legacy aforesaid, is to go to her children. But if my daughter Nancy should survive her husband Thomas Smith, in such case I order and direct her trustee to overturn and assign all and everything coming to her as legacy and bequest in this will mentioned, to her and her heirs and assigns for ever."

In 1856 Nancy Smith, the appellee, was divorced from her husband, the said Thomas Smith, *a vinculo matrimonii*, and the question was raised in this record, whether she is entitled to have her interest under her father's will transferred to her absolutely. The trustee, Christian Koenig, resisted such a transfer for the reason that Thomas Smith, though not now her husband, was still living.

The court below decreed an account and transfer as prayed in the petition, whereupon the trustee appealed to this court.

J. S. Livingood, for appellant.—The will makes the law of this case, and neither Anna Smith nor her husband could by any act of theirs alter that law. The will gave the share of Nancy to her children after her death, subject only to the contingency that she survived her husband, a contingency that has not happened. The divorce cannot affect the rights of the children. The appellee and her former husband may remarry, and then she would be in possession of the property in direct violation of the will.

The cases cited by the appellee's counsel are cases where the *cestui que trust* died, and the discoveriture was therefore permanent.

B. Frank Boyer, for appellee.—The trust was created for a special purpose, and when this purpose is satisfied the trust ceases: *Stacy v. Rice*, 3 Casey 75. The purpose was to protect appellee's property from her husband, and on her becoming discovert by his death she was to have it absolutely. A divorce places the wife in the same situation as to her property as if the husband had died. There is no difference in principle whether the marriage is dissolved by death or by the sentence of the law; in either case she becomes a single woman: *Kintzinger's Estate*, 2 Ashmead 455; *Legg v. Legg*, 8 Mass. 99; *Fink v. Hake*, 6

Watts 131; *Flory v. Becker*, 2 Barr 470; *Miltimore v. Miltimore*, 4 Wright 156; *Anstey v. Manners*, Gow N. P. 10.

The opinion of the court was delivered by

STRONG, J.—[After stating the facts.] It cannot be doubted that the trust was created for a single purpose. That was, to protect the property given at first absolutely to Mrs. Smith, against her husband. When the will was made, the Act of 1848, known as the Married Woman's Law, had no existence. Had the trust not been created, as the law then stood, Thomas Smith would have been entitled to all the personal property and to the usufruct of the realty. The trust could have had no other object than to guard against this. It was not to support a remainder to the children of the testator's daughter, for he gave at first the absolute ownership to her, and then, after having organized the trust, directed that the property should be assigned to her in fee without regard to any remainder in her children, if she survived her husband. But if the sole purpose of the trust was to protect the wife's estate against her husband, it is manifest that purpose was fully accomplished when the coverture ceased. The divorce of the parties terminated all possibility of the husband's interference with the property bequeathed and devised to the wife, as completely as his death would have done. Then why should the trust be continued after its exigencies have been met? It matters not what may be the nominal duration of an estate given by will to a trustee. It continues in equity no longer than the thing sought to be secured by the trust demands. Even a devise to trustees and their heirs will be cut down to an estate for life, or even for years if such lesser estate be sufficient for the purpose of the trust. See Hill on Trustees 239, *et seq.*, where many cases are collected. There can be no doubt that a trust for the separate use of a married woman ceases on the death of her husband, or on her divorce from him, and this though vested in terms in the trustee in fee, and though he be required to collect and pay over the rents and interest, not because such a trust is not an active one, but because it is special, and either the death or divorce renders its continuance unnecessary. If then the trust in Christian Koenig was instituted, as we think the will clearly shows, solely to protect the appellee's property against her husband, it terminated when by the divorce it became useless

as a means of such protection. The appellee is therefore entitled to a transfer of the property to her.

The decree of the court below is affirmed.

Supreme Court of Indiana.

EDMUND T. BAINBRIDGE v. THOMAS SHERLOCK ET AL.¹

The Ohio river being a great navigable highway between states, the public have all the rights that by law appertain to navigable streams, as against riparian owners.

But the public rights are upon the river—not upon the banks.

The title of the riparian owner extends to low-water mark.

The right to use the river as a highway does not imply the right to use the banks for the purposes of landing, to receive and discharge freight and passengers.

Except in cases of peril or emergency, the navigator has no legal right to land, without consent of the riparian owner, at places other than those that have in some way become public landing-places.

Riparian owners may extend wharves to, and into the navigable portion of, the river, provided they do not unnecessarily obstruct navigation.

Whoever would maintain a wharf for the accommodation of any particular class of vessels, should possess a sufficient water-front to contain that class of vessels, without obstructing access to the lands of contiguous proprietors.

A wharf-boat moored to the shore, is entitled to the same immunity from trespass, or obstruction by vessels navigating the river, as is the land itself to which the wharf-boat is moored.

The navigator landing at one wharf with permission of the wharfinger, is not justified by any public right in the river, in so landing and mooring his vessel, as that while landed its side and stern will be carried by the current against the wharf-boat of a contiguous wharfinger lower down the river, thereby obstructing access to the lower wharf.

APPEAL from the Jefferson Circuit Court.

Jere. Sullivan and Hendricks, Hord & Hendricks, for appellant.

C. E. Walker, for appellee.

GREGORY, C. J.—There are errors and cross-errors assigned, but all the questions involved turn upon the nature and extent of the rights of the riparian owner along the Ohio river.

¹ We are indebted to the courtesy of Hendricks, Hord & Hendricks, Esqrs., counsel for appellants, for this case.—EDS. AM. LAW. REG.

The appellant owns real estate in the city of Madison, bordering on the river. The river-front of this property extends from the west line of West street two squares down the river. This river-front is graded from the top of the bank to the water line, and is known as wharf property. For many years the appellant has kept upon this property a wharf-boat, subservient to the uses of river navigation and commerce. For the use of it, he receives, from steamers and other water-craft navigating the river, from \$3 to \$25 for each landing, depending on the length of time a boat remains at the wharf, and the amount of business done. Two other public wharves are maintained at Madison, viz., the "Roe Wharf," extending from the eastern line of West street up the river, 168 feet to the west line of an alley, and the "City Wharf," extending from the east line of that alley up the river, 168 feet to Mulberry street. West street is 60 feet wide; it is the principal thoroughfare leading from the steamboat landing up into the city.

The appellant keeps his wharf-boat below West street, upon and near the upper end of his wharf property. This location is convenient to the mouth of West street. The water is not as good for landing below as at the plaintiff's wharf. The wharf-boat at the "Roe Wharf" is kept at the lower end of that wharf property, upon or immediately above the east line of West street. By placing the Roe wharf-boat at that place, it also is near the mouth of West street, and is also in better water for the approach of steamers.

The appellees, the Cincinnati and Louisville Mail Line Company, have, for many years, owned and run a daily line of steamers each way, and during a great portion of the time they have run a double daily line of boats each way. For several years past all these boats have landed at the Roe wharf, making, usually, four landings each day. Sometimes a boat thus landed would remain two hours, but ordinarily, from a quarter to a half an hour.

The results of this arrangement, so far as concerned the plaintiff, were that very frequently his wharf-boat was struck and broken, and thrown out of water by defendants' steamers, thus causing direct pecuniary damage; and that constantly, at least twice, and usually four times a day, the large boats of the defendants rested upon plaintiff's wharf, lapping over and covering

up from one-third to one half of his wharf-boat. While his wharf-boat was thus occupied by defendants' steamers, no other boat could land at it without first pushing them out into the river, occupying from five to ten minutes each time. Another result of this arrangement was, and necessarily would be, that transient steamers approaching the plaintiff's wharf, but finding it thus obstructed, would, whenever there was sufficient water, pass up outside, and land at an unobstructed rival wharf above.

The evidence given, and that offered by the appellant, and ruled out by the court below, tended strongly to show that the plaintiff was damaged by this mode of landing. Is this, in legal sense, an injury, or is it *damnum absque injuria*? The solution of this question is the turning-point of the case.

The inquiry that meets us at the threshold is, what are the rights of the navigator of this river, to the use of its banks and margins? The Ohio river is a great navigable highway between states, and the public have all the rights that by law appertain to public rivers as against the riparian owner. But there is no "shore" in the legal sense of that term—that is, a margin between high and low tide—the title to which is common. The banks belong to the riparian owner, and he owns an absolute fee down to low-water mark: *Stinson v. Butler and Others*, 4 Blackford 285.

In *Ball v. Herbert*, 3 Term 253, the question considered was whether there existed a common-law right to use the banks of the river Ouze for towing boats. That was a navigable river, and in the state of navigation then existing, the right thus to use the banks was essential. But all the judges concurred in holding that no such right existed at common law.

In *Blundell v. Catterall*, 5 Barn. & Ald. 268 (7 Eng. Com. Law 125), determined in the King's Bench in 1821, the question was, as to whether or not the public had a common-law right of bathing in the sea, and, as incident thereto, of crossing the shore for that purpose. This led to a very general consideration of the subject of public and riparian rights, the result of which was a denial of the right claimed.

Justice HOLROYD, after recognising the public right of passage over the sea and over navigable rivers, says: "These rights are noticed by Lord HALE; but whatever further rights, if any, they have in the sea or navigable rivers, it is a very different ques-

tion, whether they have, or how far they have, independently of necessity or usage, public rights upon the shore (that is to say, between high and low water mark), when it is not sea or covered with water, and especially when it has from time immemorial been, or has since become, private property. For the purpose of the king's subjects getting upon the sea and upon the navigable rivers to exercise their unquestionable rights of commerce, intercourse, and fishing, there are not only the ports of the kingdom, established from time to time by the king's prerogative, and called by Lord HALE the *Ostia Regni*; but also public places for embarking and landing themselves and their goods. It was not by common law, nor is it by statute, lawful to come with or land or ship customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity, nor fish or land goods not customable, where the shore or the land adjoining is private property, unless upon the person's own soil or with the leave of the owner thereof, who, Lord HALE says, may, in such case, take amends for the trespass in unloading upon his ground, though he may not take it as certain common toll. * * * *

The public common-law rights, too, with respect to the sea, &c., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea and on the sea-shore, when covered with water; and, though as incident thereto, the public must have the means of getting to and upon the waters for these purposes, yet it will appear that it is by and from such places only as necessity or usage has appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the sea-shore or the land adjoining thereto, except in case of peril or necessity. * * *

As to the owner's right to improve the shore, it is laid down that the king cannot grant a right to lade or unlade on the *ripa* or bank, without the owner's consent. There cannot, therefore, be any common-law right to lade or unlade on the quay or shore, or land adjacent in the port. * * *

Lord HALE notices and establishes the public right of navigating and fishing upon and in the water, and the right of resort to the ports, and of lading and unlading, landing and embarking therein, either at the public places appointed, or by usage established for those pur-

poses, or with consent, upon the land, either of the king or of individuals, but no further."

Justice BAYLEY, referring to a passage from Bracton, in his opinion, says: "The word '*ripa*,' here applies to rivers and ports, and probably also to the land above the high-watermark, and if it does, is this the law of England? Have all persons the right to fasten a ship to the banks of a river, or have they a right to tie ropes to the trees, or to land goods on the bank of every navigable river? The case of *Ball v. Herbert*, 3 Term Rep. 262, is not a distinct authority upon this point, inasmuch as in that case the right of towing was claimed. But the general question as to the right of the public on the *ripa* of a navigable river was discussed, and the court appears to have been of the opinion that the *ripa* of a navigable river was not *publici juris*, and they therefore virtually overruled the authority of Bracton."

Mr. Washburn, in his work on Easements, states the law on this subject thus: "In regard to the right to land upon other points upon the banks of a navigable stream, than those which have in some way become public landings, the law would seem to confine it to cases of necessity, where, in the proper exercise of the right of passage upon the stream of water, it became unavoidable that one should make use of the bank for landing upon, or fastening his craft to, in the prosecution of his passage:" Washburn on Easements and Servitudes 484, 2d ed.

The Supreme Court of the United States, in *Dutton v. Strong*, 1 Black 23, recognise the right of the riparian owner to erect for private use a pier extending into the lake, which served the purpose both of a landing-place for freight, and for its stowage.

The Ohio river is a great highway between states under national sanction, yet we suppose that it would not be in conflict with the authority of the general government, for this state, within her territorial limits, to provide for and regulate by law public landing-places along its shore for the benefit of trade and commerce, and for this purpose, to exercise the right of eminent domain.

The right to the use of the river as a highway for passage is distinct from the right to land for the purpose of receiving and discharging freight and passengers. The former is secured to the public, the latter must be exercised with reference to the rights of the riparian owner.

The river being public and its banks being private, it is not difficult to discover the true foundation of these riparian rights, known as wharf-rights. It is essential to the successful prosecution of his business that the navigator shall make frequent landings, to lade and unlade, to receive and discharge passengers, and to receive supplies. But except in case of some peril or emergency of navigation, he cannot thus land without the consent of the riparian owner, and in return for the privilege of landing, a reasonable compensation may be demanded. This is the origin of wharfage.

In *Blundell v. Caterall*, *supra*, BEST, J., who dissented from the opinion of the court denying the common-law right of bathing in the sea, in the course of his opinion says :—

“The owner of the soil of the shore may also erect such buildings or other things as are necessary for the carrying on of commerce and navigation, on any parts of the shore that may be conveniently used for such erections, taking care to impede, as little as possible, the public right of way. This is not more inconsistent with a public right of way over it than the right of digging a mine under a road or the erecting of a wharf on a river are inconsistent with the right of way along such road or river. The former does not interfere with the use of the road; and although the latter, in order to be useful, must be carried out beyond the high-water mark, and while the tide is up, must somewhat narrow the passage of the river; yet such wharves are necessary for the loading and unloading of vessels, and the right of passage must be accommodated to the right of loading and unloading the craft that pass.”

Chief Justice ABBOTT, in the course of his opinion in the same case, says: “By what law can any quay or wharf be made? These, in order to be useful, must be below the high-water mark, that vessels or boats may float to them when the tide is in. * * * And it is to be observed that wharves, quays and embankments, and intakes from the sea, are matters of public as well as of private benefit.”

In the case of *Dutton v. Strong*, 1 Black 23, above cited, the court say: “Wharves, quays, piers, and landing-places for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States, by riparian proprietors, at a very early period in colonial times; and, in point of fact, the

right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land, from the first settlement of the country to the present time."

These wharves, if they would subserve the only purpose for which they exist, must approach at least to the edge of that portion of the river that is practically navigable. The right to place and maintain them even beyond this point, provided they do not unnecessarily obstruct navigation, is a well-established incident to riparian title. The wharf-boat is entitled to the same immunity from trespass or obstruction by vessels navigating the river as the land itself.

If a navigator lands without authority, on a barren bank, he is technically a trespasser for trampling over the pebbles. But incident to the ownership of that barren bank, is a vested right of great possible value—the right to hire it for the incidental use of navigation, whenever and wherever a developed river commerce may bring it into demand. The wharf-boat represents this right or privilege in its condition of beneficial development. It would be but an idle benefit to the proprietor, if the law protected him only against technical trespass upon the naked bank, but refused to protect him in the customary exercise and enjoyment of the only right that makes his title to the bank especially valuable.

If the navigator cannot lay his boat *in invitum* against the soil, or obstruct the proprietor's access to the river, still less should he be allowed thus to use the wharf-boat. The very right that in the first case would be but technically violated, would, in the second case, be actually and substantially invaded. It is impossible to conceive of a wharf-right without an incidental right of access. In *Irwin v. Dixon*, 9 Howard 33, the court say: "From the very nature of wharf property, likewise, the access must be kept open for convenience of the owner and his customers." So, also, it is impossible to conceive of a wharf-right without an incidental right to use a reasonable water space in front of it for the purpose of mooring vessels landing at the wharf. Of course that water space, when not actually occupied by boats, may be freely traversed by vessels navigating the river under the general public right; but it cannot be used as against the wharf proprietor and without his consent as *mooring-ground* for vessels. One cannot properly be said to own a wharf for any

particular class of vessels, unless he has in front of and contiguous to his own soil, sufficient mooring-ground for that class of vessels. This right to an appropriate space for mooring-ground is, in principle, precisely the same thing as the easement known as dock-room or dockage, appurtenant to the more elaborate and expensive wharf structures found in commercial seaports, and this right or easement has been repeatedly recognised by judicial determination.

Washburn on Easements, p. 481, has this passage: "So, a party obstructed in the use of a stream as a highway, may himself remove it, as was held where one fastened a raft of logs to the bank in such a manner as to prevent another from landing at his own wharf in a boat."

Rice v. Ruddiman, 10 Mich. 125, was a case involving the consideration of riparian rights. Judge MANNING, in his opinion in the case, says: "Wharves and piers are almost as necessary to navigation as vessels and ship-yards, or the places for the construction of vessels, are indispensable. * * * It seems to me on principle as well as reason, that the owner of the shore has a right to use the adjacent bed of the lake for such purposes."

MARTIN, C. J., in his opinion in that case, says: "They (riparian owners) have the right to construct wharves, buildings, and other improvements, in front of their lands, so long as the public servitude is not thereby impaired. They are a part of the realty to which they are attached, and pass with it. Certainly no one can occupy for his individual purposes the water in front of such riparian proprietor, and the attempt of any person to do so would be a trespass."

The theory on which the case at bar was tried in the court below, was substantially this: That in the exercise of their rights as navigators, the defendants might land upon and obstruct the plaintiff's wharf as much as they pleased, provided they did it carefully, skilfully, and that, no matter to what extent the plaintiff was actually damaged, he could not be deemed as legally injured.

The court erred in the instructions given and in those refused.

The defendants are presumed to know the natural result of their own acts. They had daily experience to show them that a landing at the "Roe wharf" would result in injury to the plaintiff. As navigators of the Ohio river, they had no right to land

on the wharf of the plaintiff, unless by his consent. The defendants were trespassers for each act of injury to the plaintiff caused by landing their boats. The court should have so instructed the jury. The evidence offered by the plaintiff, tending to show the extent of this injury, ought to have been admitted. It was not competent for the plaintiff to prove the amount of damage by the *opinion* of experts, but this must be determined by the jury from all the facts; the value of the right, the disturbance of that right, the value of the right subject to the injury caused by the unlawful acts of the defendants, are matters proper to go to the jury. The court below erred in overruling the appellant's motion for a new trial.

In our view of the case, it is unnecessary to pass upon the effect of the special findings of the jury on the general finding. Substantial justice requires a new trial.

It is assigned, as crosserror, that the court erred in overruling the demurrers to the several paragraphs of the complaint. The objection taken to each paragraph is the lack of an averment that the plaintiff himself was guilty of no negligence.

The first paragraph of the complaint avers that defendants, "without leave, wrongfully entered" upon the lands described, owned by plaintiff, and continuously used, took possession of and broke the wharf-boat of the plaintiff, on, attached to, and connected with the land.

The second paragraph avers that plaintiff was the owner, &c., of a certain wharf-boat, attached and annexed to the same lands, and that defendants, on the 1st of June 1857, and daily and continuously thereafter, ran their steamers upon and against the plaintiff's wharf-boat, thereby damaging it.

The fourth paragraph avers the ownership of the land and the wharf-boat, and a prescriptive right to keep a wharf appurtenant to the land. That defendants, with their boats, unnecessarily and continuously struck against and damaged the wharf-boat and obstructed the passage to and from it; and that they unnecessarily and without cause, occupied the river in front of the wharf, interrupting and preventing ingress and egress.

The complaint is good, and the court below committed no error in overruling the demurrer. This case does not belong to that class of cases in which it is necessary to aver that the plaintiff

was without fault. A custom existing at other places could have nothing to do with the rights of the appellant.

Judgment reversed with costs; cause remanded with directions to grant a new trial and for further proceedings.

Supreme Court of Vermont.

McDANIELS, EXECUTOR, &c., v. McDANIELS.

Conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party, and listened to by the jurors without understanding that they were guilty of misconduct in so doing.

A motion for a new trial, upon the ground of misconduct by jurors during the trial, need not contain an averment that the misconduct was unknown to the moving party before the jury retired. It would seem to be otherwise when the objection to the juror is some matter which existed before the trial commenced, and which might have been a cause for challenge.

The fact that the moving party neglected to inform the court, before the jury retired, of misconduct on the part of jurors during the trial which came to his knowledge, would not, if proved, necessarily, as a matter of law, defeat the motion for a new trial, but would be one circumstance to be considered with others by the court in determining whether, in their discretion, to set aside the verdict.

APPEAL from the probate of an instrument purporting to be the last will and testament of James McDaniels, deceased. The case was tried by jury, at the September Term of the Rutland County Court, A. D. 1866, upon the issue joined upon the plea, that the instrument is not the last will and testament of the deceased, and a verdict was rendered for the proponent. After verdict, and before judgment, a motion was filed by the defendant to set aside the verdict for several causes, among which was the following: "For that some of the panel of jurors, after they were impanelled, and during the progress of the trial, and out of court, were talked to and with, upon the subject of said cause, and favorably to the proponent, by the agents, emissaries, and friends of Isaac McDaniels, and by them were urged and solicited, and influenced by improper conversations with said jurors, or in their presence, to render a verdict in favor of the propo-

ment." This motion was supported by accompanying affidavits. Further testimony was taken and filed by both parties, and at an adjourned session of the County Court, PECK, J., presiding, the verdict was set aside for the cause above assigned,—to which decision the proponent excepted. The exceptions were allowed, subject to the opinion of the Supreme Court whether exceptions will lie in such a case. The exceptions set forth that the court found that the conversations detailed in the affidavits were had with, and in the presence of the jurors who tried the cause, during the trial, and that several of the persons holding such conversations, were the friends of the proponent, and that they held such conversations for the purpose of influencing the verdict of the jury in his favor; that this was done without the procurement of either the proponent or the defendant, and without the knowledge of the proponent. And the court did not find that it was done with the knowledge of the defendant. It was also found that the conversations were of a character directly calculated to influence the verdict in favor of the proponent.

The court did not find any corruption, or intentional misconduct in any of the jurors, but did find that some of the jurors were guilty of impropriety in suffering conversations to be held with them, and in their presence and hearing.

The counsel for the proponent contended that the court could not legally set aside the verdict; and particularly because it was not set forth in the motion, nor in the affidavits sustaining the same, that the defendant had no knowledge of the conversations when they occurred, and before the jury retired to consider the verdict. But the court held this not to be in law essential.

E. Edgerton and Daniel Roberts, for the plaintiff.—1. As a general proposition, it may be said, that the setting aside of a verdict, and the granting of a new trial, rests in the discretion of the County Court, to which no exception lies. But this discretion is not unrestrained license. It is limited by legal principles and legal rules. It depends, both as to its exercise at all, and, in a degree, as to the mode of its exercise, upon the facts found. So far as the decision below can be resolved into a legal conclusion from the facts found and stated upon the record, it is subject to revision: *Joyal v. Barney*, 20 Vt. 159-160; *Briggs v. Georgia*, 15 Id. 61; *French v. Smith et al.*, 4 Id. 363.

2. The court reports, that the conversations referred to "were of a character directly calculated to influence the verdict in favor of the plaintiff," but does not find that the verdict was thus influenced; that there was no "corruption nor intentional misconduct in any of the jurors;" and that those conversations were had "without the procurement of the plaintiff, and without his knowledge." Courts will not visit the consequences of an irregularity upon an unoffending party, unless it appear that it has wrought some injury to the other party: *Dennison v. Powers*, 35 Vt. 39; *Downer v. Baxter*, 30 Id. 467; *Blaine v. Chambers*, 1 S. & R. 169; 2 Grah. & Wat. N. T. 309, 310, 312, 317; *Shea v. Lawrence*, 1 Allen 167.

3. This was not a proper case for the exercise of any discretionary action of the court, inasmuch as it must be assumed that the defendant knew of the matters complained of, at the time of their occurrence, and did not bring them to the knowledge of the court before the verdict, but lay quiet, speculating upon the chance of a verdict in his favor.

On this point the case states the non-finding of the court. "The court did not find that it was done with the knowledge of the defendant"—thus distinguishing between this and the positive finding in respect to the plaintiff's knowledge.

Clearly the tendency of the testimony was to prove this knowledge on the part of the defendant.

But to warrant setting aside the verdict, it should be both stated in the motion and be proved affirmatively, that the defendant did not know of the matter complained of before the rendition of the verdict: *Brunskill v. Giles*, 9 Bing. 13; *Herbert v. Shaw*, 11 Mod. 118; *State v. Camp*, 23 Vt. 551; *Jameson v. Androscoggin Railroad*, 52 Me. 412; *Pettibone v. Phelps et al.*, 13 Conn. 445; *Selleck v. Sugar Hollow T. Co.*, Id. 452; *Woodruff v. Richardson*, 20 Id. 237; 2 Grah. & Wat. N. Trials 303, 575.

Charles C. Dewey and A. Potter, for the defendant.—I. Exceptions will not lie, and the case should be remanded.

a. The court found the fact that the persons guilty of tampering were the friends of the proponent.

b. That the conversations were of a character directly calculated to influence the verdict of the jury in favor of the proponent.

c. That they were held for the purpose of influencing the verdict of the jury in his favor.

d. That the jurors were guilty of impropriety in suffering such conversations with them, and in their presence and hearing. .

e. And that the conversations were in violation of law.

II. As a motion for a new trial, for causes *dehors* the record, is and must be addressed to the discretion of the court, the decision cannot be revised on exceptions, unless, indeed, it be for the improper admission or rejection of evidence, or when it is apparent the decision is based upon a false legal assumption: *Sheldon v. Perkins*, 37 Vt. 557; *Shea v. Lawrence*, 1 Allen 169; *White v. Wood*, 8 Cush. 415; 2 Gra. & Wat. 47, n. 4.

It has never been held, or even claimed, that jurors' depositions may not be received to prove the misconduct of the parties or of persons acting in their behalf: *Ritchie v. Halbrooke*, 7 S. & R. 458.

III. 1. It is not essential that the tampering be done by the party himself, nor by his procurement. It is sufficient if it be done by his friends and in his behalf: *Deacon v. Shreve*, 2 Zab. 176; *Coster v. Merest*, 3 Brod. & Bing. 272; *Knight v. Freeport*, 13 Mass. 218; *Shea v. Lawrence*, 1 Allen 169; *Brunson v. Graham*, 2 Yeates 166; Pleas of the Crown, vol. 2, p. 308; Gra. & Wat. vol. 2, p. 298, *et seq.*

2. And even if the attempt to bias the jury be made by strangers, the verdict will be set aside if there is fair ground for belief that it has been influenced thereby: Gra. & Wat. vol. 2, p. 309.

3. So, in the class of very numerous cases, where papers have been delivered to the jury by mere mistake, the verdicts have been set aside, whenever the papers had any tendency to bias them: *Whitney v. Whitman*, 5 Mass. 405; Vin. Abr., *Trial*, pl. 18; *Hix v. Drury*, 5 Pick. 296; *Sargent v. Roberts*, 1 Id. 337.

4. The same rule obtains, and verdicts will be set aside: 1. Where jurors are allowed to separate before a verdict is agreed upon, if the separation is attended with the slightest suspicion of abuse: *Oliver v. Trustees of Pres. Church*, 5 Cow. 283; *Horton v. Horton*, 2 Id. 589. 2. Where a juror gives private information to his fellows, material to the issue, which may have influenced them: *Sam v. The State*, 1 Tenn. 61. 3. Where jurors re-examine witnesses who have already testified: *Met-*

calf v. Dean, 2 Bay 94; *Perine v. Van Note*, 1 South. 146; *Bedington v. Southall*, 4 Price 232.

It thus appears from the authorities above cited, and many others to be found in the books, that the ground upon which courts set aside verdicts for improper attempts to influence the jury, is not merely and only the misconduct of the party, but the possibility that the unlawful attempt, by whomsoever made, or with whatever motive, may have inoculated the verdict with vice or error.

IV. 1. It is a corollary of the preceding proposition, already incidentally discussed, that it need not affirmatively appear that the verdict was injuriously affected by the tampering. If the purity of the verdict might have been affected, it will be set aside. And this rule has been adhered to with great rigor and tenacity: *Whitney v. Whitman*, 5 Mass. 405; *Cohen v. Robert*, 1 Strob. 410; *Perkins v. Knight*, 4 N. H. 474; *Hare v. The State*, 4 How. (Miss.) 187; *Com. v. Roby*, 12 Pick. 496; *Com. v. Wormley*, 8 Grat. 712; *Custer v. Merest*, 3 Brod. & Bing. 272; *Knight v. Freeport*, 13 Mass. 218; *Gra. & Wat. vol. 2*, p. 300; *Hix v. Drury*, 5 Pick. 286.

The opinion of the court was delivered by

STEELE, J.—The motion for a new trial was properly granted. It was not incumbent upon the moving party to show that the verdict was, in point of fact, influenced by the unlawful conversations. It is quite enough that, in a doubtful case, conversations with the jurors have been had during the progress of the trial for the purpose of influencing and directly calculated to influence them to render just the verdict they did. There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law and upon the evidence in court. If the court, in their instructions to the jury, err, with respect to some proposition of law, it is well understood that the right of the defeated party, on exceptions to a new trial, does not depend on his showing that the error actually influenced the verdict. It is enough, if its natural tendency is to influence the jury to render their verdict against him, and such may reasonably have been its result. The right to a cor-

rect charge from the court is no more sacred or important than the right which, in this case, was violated. The analogy might be carried farther. It is not essential to the right to a new trial, on exceptions, that the error of the court should have been intentional, or by the fault of the prevailing party. So, in this case, the defendant was not any the less likely to be injured because the jurors did not appreciate the impropriety of tamely listening to conversations intended to influence them, or because the plaintiff was unaware of the officious efforts of his friends on his behalf. The friends of the plaintiff who thus approached the jury were guilty of a flagrant violation of the law, and the jurors who suffered themselves to be so approached, though they may have meant no wrong, were guilty, not only of a violation of the law, but also of the oath they had taken *to say nothing to any person about the business and matters in their charge but to their fellow-jurors, and to suffer no one to speak to them about the same but in court.* Both were liable to severe and summary punishment. The plaintiff, as he was unaware of these transactions, is not liable to punishment, but it does not follow from this that he can hold a verdict which is the result of a trial corrupted, though without his fault, by a shameful disregard of the familiar rules which are necessary to a decent administration of the law. The court set the verdict aside, not as a punishment to any one, but in justice to themselves, as well as to the defendant, that the trial may be conducted fairly so that the verdict, when finally rendered, may be entitled to the respect of both parties and the confidence of the court as the result of a trial substantially according to law, and upon the evidence in court. It is true that a verdict should not be set aside for every trifling error of law by the court, or for every trifling misconduct of a juror which occurs without the fault of the prevailing party, but it should be whenever the error or misconduct renders it reasonably doubtful whether the verdict has been legitimately procured.

The plaintiff insists that the motion is fatally defective because it contains no allegation that the defendant had not full knowledge of the matters complained of before the jury retired to consider their verdict, and that this is a defect which cannot be cured by proof, and that, even if it could, it has not been in this case, the court merely stating in the exceptions that they did not find that the misconduct occurred *with* the knowledge of the defendant,

and not stating that they did find that it occurred *without* his knowledge. We do not think these objections are well taken. It was not incumbent upon the moving party to either allege or prove that he had not such knowledge. If the other party could prove that he had, or if he could prove that he had not, it would be one fact to be considered, with others, by the court in determining whether, in their discretion, to grant the motion, but the circumstance that the moving party had such knowledge would not, as a matter of law, defeat the motion. The case is clearly and broadly distinguishable, both in reason and authority, from those in which the objection to the juror is some matter that existed before the trial. If an objection to a juror exists when the jury are impanelled, the juror may be challenged and another substituted, and if a party knowing the objection neglects to challenge, he thereby expresses his satisfaction with the juror. But where the objection arises from misconduct of the juror during the trial, the opportunity for challenge has passed. Another juror cannot then be substituted and a fair trial thereby secured. If the juror is dismissed it but results in what is asked for here—a new trial. A party ought usually to suggest to the court any serious misconduct of the jurors of which he has positive knowledge, or entirely reliable information, particularly if learned early in the trial, as it *may* result in an immediate discharge of the jury, and a saving of much time and expense. But the fact of the misconduct may be denied, and a court cannot always interrupt a trial to investigate charges against a juror, and must exercise very great caution and discretion to be able to even make inquiries of the jurors with relation to their conduct in such a manner as to create in their minds no feeling of resentment toward either party. We cannot hold that the failure of the party, if proved, to make the suggestion to the court would be more than a circumstance to be considered and weighed, with others, by the court in determining whether, in their discretion, to grant a new trial.

It is very true that in two Connecticut cases it has been held that it is necessary for the party to aver in his motion his ignorance, until after the jury retired, of the misconduct which occurred during the trial. But the latter of these two cases, *Woodruff v. Richardson*, 20 Conn. 241, professes to be governed by the earlier, *Pettibone v. Phelps*, 13 Conn. 452; and in *Petti-*

bone v. Phelps, the court, after stating several very good reasons why the motion should be denied, merely add, a point not made by counsel, that the motion is also insufficient for the reason that it contains no allegation that the misconduct of the juror was unknown to the plaintiffs before the trial closed, and that it was settled in *Selleck v. The Sugar Hollow Turnpike Co.*, 13 Conn. 453, that such an allegation was essential. It thus seems that this doctrine, in Connecticut, originally rests solely upon the authority of *Selleck v. The Sugar Hollow Turnpike Co.* Upon examination of that case, it turns out that the objection there taken was not at all misconduct by a juror during the trial, but was a disqualification which existed before the trial, in that the talesman was not an elector in Connecticut, but a citizen of New York; and the court hold that if the party knew the fact at the trial he might have challenged the juror provided he did not choose to waive the disqualification, and that he should have alleged that he did not know it in order to excuse his not making the objection seasonably and regularly. It is clear, therefore, that this case is no authority to warrant the decisions which professedly rest upon it.

The views which we have expressed are decisive of the matter before us, and it becomes unimportant to discuss the other questions presented. In the opinion of the court, this case presents a state of facts in which the court below, in the exercise of their discretion, not only might without error, but ought to have granted a new trial, and the exceptions to the action of the court in so doing are overruled and the cause is remanded.

Supreme Court of Tennessee.

SOLOMON McREYNOLDS v. THE STATE.¹

To constitute the crime of bigamy, there must be a valid marriage subsisting at the time of the second marriage.

A marriage between slaves was, in legal contemplation, absolutely void; but if the parties, after their manumission, continued to cohabit together as husband and wife, it was a legal assent and ratification of the marriage; and if while such marriage exists, one of the parties marries another, it is bigamy.

THE plaintiff in error, a free man of color, was indicted at the

¹ We are indebted to Hon. J. O. Shackelford, for this case.—EDS. AM. LAW REG.

January Term 1867 of the Circuit Court of Montgomery county for bigamy. He was arraigned and tried at the same term of the court before a jury of the county, and was convicted and sentenced to two years' imprisonment in the penitentiary of the state. Motions for a new trial, and in arrest of judgment, were entered and severally overruled, from which he has appealed in error to this court.

The facts of the case are substantially as follows: In 1856, the plaintiff in error was a slave, the property of Wilson O. McReynolds, a citizen of Montgomery county, Tennessee; during that year the plaintiff in error and Eliza Elder, a slave, were married. The marriage rites were solemnized by Fred Martin, a colored preacher. It was by and with the consent of the owners of the slaves; they continued to live together as man and wife until about the 1st of January 1867. Then the plaintiff in error procured license of marriage from the county court clerk of Montgomery county, and the rites of marriage were solemnized between the plaintiff in error and one Betsy Edington, a free woman of color.

On the trial of the cause, the court summed up the law of the case as follows: "If the proof shows the plaintiff in error had, prior to his freedom, contracted a marriage with a woman of his color, and lived with her as her husband—in other words, that the two lived together as man and wife, they are now legally such; and if the plaintiff in error has married another woman, while his wife first married was living, he is guilty as charged in the indictment."

The opinion of the court was delivered by

SHACKELFORD, J.—This is a novel case, and presents an interesting question, and is one of great importance, involving the domestic relations of that class of persons who have been recently released from the condition of slaves and given the rights and privileges of free persons. For the determination of the question involved, it is necessary to look to the status and conditions of these persons, while in a state of slavery, and see what rights and privileges were accorded them. The municipal law did not recognise the rites of marriage between slaves; they had no civil rights except where the right of freedom was involved, in which case they could prosecute a suit by their next friend, or in cases

affecting his life, he was tried as a freeman. Unconditional submission to the will of the master was the duty of the slave. He was protected in life and limb from his violence. They were permitted to select their wives, and were often married by a preacher of their own race; sometimes took up and cohabited together, and were recognised as husband and wife by their owners. They were generally happy and contented in the humble condition. The cares of the future did not press upon them; their wants were supplied by their owners, and their children provided for. But the institution has ceased, with all its complications, and they are now given the rights and privileges of citizens. It has devolved upon the courts the duty of declaring the rules of law applicable to them in their domestic relations, growing out of their changed condition. The slaves having no civil rights, could they contract in marriage while in a state of slavery so as to be binding upon them after their emancipation? Marriage is defined to be a social contract. Lord ROBINSON, a Scottish judge, in a passage approvingly quoted by Judge STORY, and by Bishop, in his work on Marriage and Divorce, § 6, says, "It is a contract *sui generis*, differing, in some respects, from all other contracts, so that the rules of law, which are applicable in expounding and enforcing other contracts, may not apply to this."

The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the contract of parties; but it differs from other contracts from this, that the rights, obligations, and duties arising from it are not left entirely to be regulated by the agreement of the parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will. It confers the status of legitimacy on children born in wedlock, with all the consequential duties and privileges thence arising. It gives rise to the relations of consanguinity and affinity. In short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general among civilized nations, be dissolved by mutual consent, and it subsists in full force, even although one of the parties should be for ever

rendered incapable, as in the case of incurable insanity or the like, from performing his part of the mutual contract.

In this state the common law was changed, and marriages are contracted and governed by municipal law. The statute laws of the state were applicable to free persons, and did not apply to this class of persons at the time of their marriage when in a state of slavery. Therefore, there being no statutory law recognising marriage between slaves, we must look to the common law to see its effect upon persons who are not within the rule of municipal law, and be governed in our conclusions by analogous principles. At common law it is the declared assent of the mind to the act of marriage which makes it legal. Such as declare their assent shall be bound. Though the slave could make no civil contract, and the municipal law did not recognise the state of marriage between slaves, and a marriage was, in legal contemplation, absolutely void, and no civil rights could grow out of such a relation while in a state of slavery, it must be admitted there was the moral assent of the mind on the part of slaves to a marriage. They were usually married by one of their own race, and lived together as man and wife. What is the legal effect of such a marriage after manumission, the parties continuing to cohabit as man and wife? By the common law, if a boy under fourteen, or a girl under twelve years of age marries, the marriage is inchoate and imperfect, and when either of them comes to the age of consent, they may disagree and declare the marriage void without any divorce or sentence in the spiritual court; but it is so far a marriage that if, at the age of consent, they agree to continue together, they need not be married again: 1 Black. Com. 437. It is a well-settled rule, where marriages have been entered into, when one of the parties was laboring under temporary insanity, if the parties continue to cohabit after a lucid interval, the cohabitation will render their marriage good: Bishop on Marriage and Divorce, § 140. This principle was settled by this court in the case of *Cole v. Cole*, 5 Sneed 57. The court say, "If the proof established the wife was of unsound mind at the time of the marriage, there is abundant evidence she was afterwards restored, at least temporarily, and did not repudiate, but her acts and conduct recognised the validity of a marriage. A lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane, and this without any new solemnization." In support of this

principle, the court refer to Bishop, § 189, 6 Metcalf 144. Apply these principles to the case under consideration. The plaintiff in error, while in a state of slavery, was married according to the usage and customs of the race. They continued to live together as man and wife until their emancipation. The relation of husband and wife continued until January 1867, when he abandoned his wife and married another. At common law we have shown it is the declared assent of the will to the act of marriage which makes it legal. Such as declare their assent shall be bound. Though the plaintiff in error was incapable of making any valid contract while in a state of slavery, and the marriage was void, and he could have dissolved the relation as soon as he was capable of contracting, yet he having continued to live with the woman he had married in a state of slavery, it was a ratification of the marriage. Bishop, in his work on Marriage and Divorce, § 162, in reference to marriage of slaves, says: "If after the emancipation, the parties live together as husband and wife, and if, before emancipation, they were married in the form which either usage or law had established for the marriage of slaves, this subsequent mutual acknowledgment of each other as husband and wife should be held to complete the act of matrimony, so as to make them lawfully and fully married from the time at which this subsequent living together commenced;" and in support of this principle he cites 3 Iredell's Eq. 91; 23 Miss. 410; Pointer on Marriage and Divorce 157; and the case of *Cole v. Cole*, 5 Sneed 57. Doubts existing in the public mind as to the validity of such marriages while in a state of slavery, the legislature, with a view to elevate this class of the population in morals, and to keep them together as families who had contracted marriage in a state of slavery, on the 26th of May 1866, passed an act to define the term free persons of color, and to declare the rights of such persons. The 5th section of said act is as follows: "That all free persons of color who were living together as husband and wife in this state, while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may be hereafter acquired by said parents, to as full extent as white children are entitled under existing laws of this state."

The passage of this act did not change or alter the law in reference to those who were married while in slavery, and con-

tinued to cohabit together as man and wife after their emancipation. The marriage of such persons was made valid by their consenting to live together after their emancipation ; and having given, while in a state of slavery, a moral assent, as soon as they were capable of contracting or legally assenting to the marriage, it would become valid.

The act of the legislature was proper under the circumstances in which it was passed. It was supposed this class of persons were not embraced within the rules of the law regulating marriage. The object of the legislature was to give the sanction of law, and bring within its rules this class of persons in their domestic relations.

Such being the principles of law governing this case, was the court right? He instructed the jury if the plaintiff in error had prior to his freedom contracted a marriage with a woman of his color, and lived with her as husband, and had married another woman while his wife was living, he would be guilty as charged. Under this charge, if the plaintiff in error had married another woman while the wife he had married in a state of slavery was living, the jury were instructed he was guilty. This is erroneous. To constitute the crime of bigamy, there must be a valid marriage subsisting at the time of the second marriage. His honor should have instructed the jury, if the plaintiff in error had married before his emancipation, and had continued to live and cohabit with his wife he had married while in a state of slavery after their freedom, it was a legal assent and ratification of the marriage, and the plaintiff in error having married another while the first marriage existed, was guilty.

The judgment of the court must be reversed, and a new trial awarded.

Supreme Court of Michigan.

HOBART v. THE CITY OF DETROIT.

The fact that an article is patented, does not necessarily prevent any person but the patentee from contracting to supply it ; others may do so, taking the risk of being able to obtain the patentee's license.

Therefore, where a city charter provides that no contracts shall be made by the city, except with the lowest bidder, after advertisement of proposals, it does not prevent the city from contracting for a patented article, such as the Nicholson

pavement, although in point of fact the only bidder was the patentee, who held a monopoly of the article.

APPEAL in chancery from Wayne Circuit Court.

Moore & Griffin, for appellant.

G. V. N. Lothrop, for appellee.

The opinion of the court was delivered by

COOLEY, C. J.—The complainant seeks to enjoin the collection of a tax levied upon a lot owned by him, for the purpose of paying the expense of paving in front of it with the Nicholson pavement, alleging, as a ground of injunction, that the contract for such pavement was illegal, and therefore invalid.

The question of validity arises upon the following facts: Section 12 of chapter 8 of the city charter provides as follows: "No contract for the purchase of any real estate, or for the construction of any public sewer, paving, gravelling, planking, macadamizing, or for the construction of any public work whatever, or for any work to be done, or for purchasing or furnishing any material, printing or supplies, for said corporation, if the purchase of said real estate, or the expense of such construction, repair, work, material, or supplies shall exceed \$200, shall be let or entered into except to and with the lowest responsible bidder, with adequate security * * * and not until advertised proposals and specifications therefor shall have been duly published in at least one daily newspaper published in said city, and for such period as the common council shall prescribe." The right to lay the Nicholson pavement in Detroit at the time this contract was let was owned exclusively by the firm of Smith, Cook & Co., the contractors, who alone, therefore, it is said, could and did bid for the contract, and there being no possibility of a competitor, the contract was awarded to them on their own terms. This circumstance of exclusive right, it is claimed, precludes the application of this provision of the charter to such a contract, inasmuch as the purpose of the provision, which was to secure open and public competition, could not possibly be accomplished where there could be but one bidder.

The doctrine of the complainant leads to this conclusion: That wherever, from the nature of the case, there can be no competition, the city can make no contract, however important or

necessary for the interest of the city, since contracts, except by public letting, are forbidden by the express terms of the statute, and those by public letting are forbidden by an implication which is equally imperative. And if applied to this case, however much this mode of paving may exceed all others in utility, it cannot be adopted in the city of Detroit, or in any other city with the like provision in its charter, even although the proprietors of the patent might be willing to lay it on terms more advantageous to the city than those on which pavement of less value could be procured.

To support this conclusion, we must import into the statute a condition which we must suppose to pervade its spirit, but which is not expressed by its words. The power which the charter gives to the common council to cause the streets of the city to be paved, is conferred by another section in very ample terms—the sole condition imposed upon it being the public letting of the contract to the lowest bidder. The courts, I think, should be very cautious about importing new terms into a statute in order to make it express a meaning which its words do not convey, and they ought at least to first make sure that they are not changing the legislative intent, and giving the statute an operation that the legislature never designed, and perhaps would never have assented to.

The benefits to be anticipated from the public letting of contracts, must vary greatly in the different classes of cases, according to the extent of the competition that is possible, or that can be excited. If unskilled labor is to be advertised for, or a work which is open to all, and all the materials for which are abundant at regular market prices, it is evident that everybody may bid, and the competition be general. But if the work to be constructed require the constant attendance of a scientific overseer, or if some of the materials be scarce, and owned by a few persons only, or if the work be so expensive as to be beyond the means of most persons according to the terms on which it is to be constructed, it must be very apparent that in these and many other cases which can be supposed, the same full benefits of competition are not always to be obtained, which are probable in the cases first supposed, and that the danger from monopolies and combinations will be proportionately greater.

It will not be claimed, however, that the city has not authority

to let contracts in these cases ; and even if two persons only are in position to become bidders, it would be conceded that a contract could be lawfully let, even though but one of the two should actually throw in proposals. The security of the city against combinations and extravagant contracts in such cases must rest in the power which the common council possesses to reject any bid which they might regard as unreasonable—a power which the legislature have evidently considered of some value, as otherwise they would have made the fact of lowest bid conclusive, and the execution of a contract in accordance with it compulsory.

It is very clear, therefore, that the courts cannot step in and declare a contract thus publicly let to be void because the anticipated benefit was not obtained from the competition, if any competition was possible. The statute has fixed a rule from which great benefit will be derived in many cases, and some benefit in most cases, and it has declared that contracts shall be valid which comply with that rule. The rule was made general for the benefits that will generally flow from it ; and the purpose is to attain those benefits wherever practicable, be they more or less. We cannot declare a contract void on the sole ground that no benefits followed the application of the rule in that particular case, though the common council might have refused to enter into it for that reason if they had seen fit. And if we cannot declare a contract void because of this result, neither, I think, can we do so because beforehand the result might be supposed inevitable.

The case was argued as if such a patent right was a thing which stood by itself, so that very few cases could be liable to the objection now taken. This, however, is not so. The objection would be applicable in any case where the city might have occasion to procure any patented machine, or to let any contract requiring the use of any invention secured by letters patent. It is true that in the case of machines of known utility, the market will generally be supplied at regular rates ; but it frequently happens that one person, firm, or corporation alone has them for sale, so that there is a practical monopoly, even though some of the machines may be in the hands of individuals who have purchased them for their own use. Yet unquestionably other persons than the owners of the right may bid for a contract to supply such machines, relying, perhaps, on being able to obtain the privilege of manufacturing them, or upon purchasing them at the rates at

which they are generally sold. Their contract would be valid, notwithstanding they might find it difficult or even impossible to perform it.

But it is sometimes the case that there is as complete a monopoly of some material necessary to the performance of a public contract, as of a patent right the use of which is essential. It might even happen with a common material, that at a particular emergency all that was within reach, or that could be obtained within the necessary time for the performance of the contract, would be owned by a single individual. In such a case, on the complainant's theory, the public work must be suspended, however necessary and urgent. And as a monopoly in regard to any necessary article, however insignificant, would be as fatal as if it extended to all the material, injunction-bills of this kind, I fear, would multiply upon us to the great detriment of the city, since contractors, in making their bids, would be compelled to add thereto a sum sufficient to cover the risks of loss from delayed payments and from possible defeat in a suit in chancery.

But it is not, I apprehend, strictly correct to say that because the patented invention which must be made use of is owned by one person exclusively, therefore no one else can be a bidder. Every one has a right to bid, and to take upon himself the risk of being able to procure the right to make use of the invention. Certainly the showing that Smith, Cook & Co. owned the right to put down the Nicholson pavement in the city of Detroit, does not go far enough to show that they alone could bid on a contract for that purpose. If that firm held the privilege of putting down the pavement for sale at a regular price per square foot or yard, the opportunity to bid for a contract would be as much open to public competition as any other work requiring skilled labor. For aught we know this was the case; and we may well take notice of the fact that it is frequently by thus selling the "royalty" that the owners of new inventions expect to obtain their reward. The royalty acquires a sort of market value which becomes well understood; and all persons have the benefit of this market value, just as much as they would if the ownership and right to control were of such a character that monopoly would be impossible. True, the owner may at any time withdraw the royalty from sale in order to drive hard bargains; but if he does,

the public will still retain a security in the power to refuse to contract with him.

The theory of the complainant is that more than one bid in this case was impossible. But suppose, in point of fact, Smith, Cook & Co. had not bid at all, but several other persons having first ascertained at what price they could obtain the royalty, had entered into a sharp competition for this contract, would it not have been demonstrated that not only was more than one bid possible, but that the very benefits the charter designed to secure by the public letting had been obtained? And if this is so, how can it be said that the fact that a monopoly of the patent exists necessarily defeats all contracts to which the patent is essential?

On the theory of the complainant it is easy to imagine cases in which the court would be placed in the remarkable position of holding contracts void on the ground that competition was impossible, and therefore the benefit of the public letting could not be obtained, when in fact there had been competition, and the benefit had actually been realized. I do not believe there is any mere implication of the law which can force us to this conclusion; and to my mind it is very clear that the legislature would not intentionally have so tied up the hands of the city authorities as to preclude their making use of new and valuable inventions. I am not therefore disposed to put upon the charter a forced construction to that effect, which its terms do not seem to justify.

I am aware of the contrary decision which, by a divided court, has been made in Wisconsin in the case of *Dean v. Charlton*, 7 Am. Law Reg. N. S. 564; but, with great respect for the reasons assigned by that court, I am still brought to the conclusion that the decree of the circuit judge was correct, and it must be affirmed.

CHRISTAINCY and GRAVES, JJ., concurred.

CAMPBELL, J., dissenting.—I am unable to reconcile the action of the city with the provisions of its charter. It may be very desirable to allow such a course to be taken, but the prohibition seems to me to be very clear, and if this case can be taken out of it, I do not perceive how in any case the citizens can be protected from the very dangers which the charter was intended to prevent.

The charter (chap. 8, § 12) declares that no contract for paving (or various other things), if for more than \$200, shall be let or entered into except to and with the lowest responsible bidder, with adequate security, and not until advertised proposals and specifications therefor shall have been duly published in a daily paper. The same section prohibits contracts with persons who are in arrears to the city, as well as some others, and forbids contracts requiring mechanical skill to be let to other persons than mechanics.

It cannot be claimed that if the monopoly of the pavement in question belonged to a public defaulter, or to one who was not a practical mechanic, any ground of dispensation could be found. Yet the necessity for opening the door would be as great in that case as in any other, if the city needs the improvement. But it has not been deemed safe to allow a full and free choice, and we have no power to remit any legislative requirement.

The clause in question cannot usually create more difficulty when articles or processes are patented, than in other cases. The patent laws contemplate that things patented shall be offered to the public on equal terms, and so generally is this done that the rule of damages for infringement is governed by the price usually charged. And in most cases, therefore, improvements requiring the introduction of patented articles or methods, are as open to general competition as any others. But if a rigid monopoly is kept up, there can be no competition, and all the evils contemplated by the act are introduced. Instead of obtaining the work at the lowest price, it can only be had at the highest price which is supposed to fall short of prohibition. Instead of competing skilful workmen, those must be employed whom the patentees see fit to force upon the corporation.

Instead of choice in the quality of materials, it must accept such as the contractor is willing to engage for. And publication of proposals must be an empty ceremony when there is no chance of competition, and when the choice of the patented improvement is practically equivalent to a choice of the contractor at his own price.

The charter was designed, not only to provide against extravagant prices, but also, as is very clear from many clauses, to prevent the opportunity for favoritism and corruption in the council. If there are several different kinds of paving, and only one is

patented, the patentee, retaining his monopoly, would find it well worth his while to be liberal in inducements to select his plan, and could afford to be all the more liberal because he could recover back his outlay by enhancing his prices. But those whose bids were open to competition would, to say the least, stand on a much less favorable footing. While there is no reason for imputing any wrong motive in this case, and while I do not believe many public bodies are open to these sinister influences, yet it is not to be denied that this is one of the dangers in the eye of the legislature, and I can conceive of no more fruitful source of possible inducements to corruption than the monopoly of paving the streets of a large city.

It must not be forgotten that while the adoption of a new style of paving may be convenient, it can never be necessary. No patent continues beyond a few years, and a city that is within fourteen years of the last improvements cannot be very backward in progress. Moreover, the real merits and durability of a new pavement can never be fully tested very much before the term of privilege has approached its close. As each new plan is generally somewhat expensive, its adoption must always require some consideration. The cost of paving is never a very light burden, where property is unproductive, and falls heavily upon many who are not able to bear any needless charges. Those plans which have been tried and are best known are apt to be reasonably economical. The charter requires these safeguards to protect the individual citizen upon whom this expense is charged, and nothing short of necessity can render it expedient to open the door to unchecked expenditure. I cannot see any strong reason for assuming that if this very case had been presented to the legislature they would have found in it any occasion for qualifying their language, or for removing the restrictions they have in terms imposed.

I think the case comes within the spirit as well as the letter of the charter, and that the injunction should be made perpetual.

Judgment affirmed.

*United States District Court, Western District of Pennsylvania.*GORDON ET AL. v. STOTT ET AL.¹

A party may serve a subpoena on his witnesses, and in cases where he succeeds in the trial recover his costs therefor.

In cases of involuntary bankruptcy and a trial by jury, a docket fee of \$20 is taxable in favor of the counsel of the successful party.

In proceedings in voluntary bankruptcy a docket fee is not taxable, except in those voluntary cases, when under the 31st section of the act the court is authorized to direct a trial upon specifications of objections to the bankrupt's discharge.

The word trial in the Bankrupt Act means a trial by jury.

STOTT & ALLEN, merchants in Erie, failed in business in the summer of 1867, and Gordon, McMillan & Co., of Cleveland, commenced proceedings to force them into bankruptcy. Defendants denied the allegations in the bill, and made an issue which was tried by a jury at last October Term at Pittsburgh. Defendants served the subpoena in the case, and taxed the usual fees for said service. Verdict for defendants.

Defendants' attorney claimed the docket fee of \$20, given to him by Act of Congress. To these items plaintiffs excepted.

1. That the subpoena having been served by the party, and not by the marshal, the fees for service and mileage are not recoverable.

2. That the defendants' attorney was not entitled to the docket fee of \$20, allowed to the attorney of the successful party in the courts of the United States.

F. F. Marshall, for plaintiffs.

Benjamin Grant, for the defendants, referred to 2d clause, 1st sec. Act 26th February 1853, Brightly's Dig. 272; 2 Bouv. Law Dic. tit. *Trial*; Wh. Law. Dic. tit. *Trial*, p. 1014; Coke Litt. 124; *United States v. Curtis & Holston*, 4 Mason 232; U. S. Dig. 456, 457, par. 13.

MCCANDLESS, D. J.—The questions presented are material to both the debtor and creditor, as well as to gentlemen of the legal profession. They have been raised to settle a matter of practice, about which there has been much diversity of opinion.

¹ We are indebted for this case to Benjamin Grant, Esq., counsel of defendants.—
EDS. AM. LAW REG.

This is a case of involuntary bankruptcy. The debtors filed their answer, denying the acts of bankruptcy alleged in creditors' petition, and demanded a trial by jury which was allowed. There was a trial, and the jury rendered a verdict that the facts set forth in the petition were not true. It then became the duty of the court, under the 41st section of the act, to dismiss the proceedings, and the respondents were entitled to recover costs.

They filed their bill to which the creditors except.

1. That the subpoena having been served by the party, and not by the marshal, the fees for service and mileage are not recoverable.

It is true that the marshal is the executive officer of the court, and may be directed by the court to serve it; but the mandate of the writ is not to him, but to the witness who is commanded to appear and testify. As there is no legislation of Congress directing the service of a subpoena by the marshal, we do not feel disposed to depart from the practice of the state courts, which has always permitted the party to serve the precept, and allowed him costs for the same. The 1st section of the Act of 24th of September 1799 requires the marshal "to execute throughout the district all lawful precepts *directed to him*, and issued under the authority of the United States." But the subpoena is not directed to him but to the witness, and the marshal might legitimately refuse to serve it, unless commanded so to do by an order of the court. The party is interested in the production of the witness, and we can see no good reason why, if he serves the writ, he should not be paid for it.

It is further objected that the distance charged for mileage was not actually travelled, but as there are no proofs to sustain this allegation, it is dismissed. The first exception is overruled.

2. The second exception raises the question whether the docket fee of \$20, allowed to the attorney of the successful party in the courts of the United States, is properly taxable in bankruptcy, and, so far as this court is advised, it is a question of the first impression.

It is clear that in cases of voluntary bankruptcy it is not allowable; but we are of opinion that in those of involuntary bankruptcy, where there is a trial by jury, that it is taxable, as also in those voluntary cases, where, under the 31st section of the act, the court is authorized to direct a trial upon specifica-

tions of objections to the bankrupt's discharge. By the Act of the 26th of February 1853, it is provided that "in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States Court," the following and no other compensation shall be taxed and allowed: In a trial before a jury in civil and criminal causes, or before a referee, or on a final hearing in equity or admiralty, a docket fee of \$20. In cases at law, where a judgment is entered without a jury, \$10, and \$5 where a cause is discontinued. These are all in cases of adversary proceedings, and the distinction is drawn between a "trial" and a judgment without a trial. The word "trial" here, as illustrated by Mr. Justice STORY, in 4 Mason 235, means a trial by jury. The pleadings may be filed, the issue made up, but until the jury is sworn there is no trial. In the case before us there was an issue, the jury were sworn, there was a trial, and a verdict against the creditors. Besides, General Orders in Bankruptcy 31, "costs in contested adjudications," provides that "in cases of involuntary bankruptcy, where the debtor resists an adjudication, and the court, after hearing, shall adjudge the debtor a bankrupt, the petitioning creditor shall recover, to be paid out of the fund, the same costs that are allowed by law to a party recovering in a suit in equity; and in case the petition is dismissed (as in this case), the debtor may recover like costs from the petitioner."

The second exception is, therefore, also overruled, and the clerk is directed to tax a docket fee of \$20 to the attorney for the respondents.

United States District Court, District of Wisconsin.

THE UNITED STATES v. SIX FERMENTING TUBS—HODSON,
CLAIMANT.¹

A claimant may take advantage of the limitation of section 68 of the Internal Revenue Act of 1864, under an answer of general denial.

The Act of 1866, repealing the 68th section of the Internal Revenue Act, continues the section as to offences against the Revenue Laws committed before the repeal.

¹ We are indebted for this case to the courtesy of Judge Miller.—EDS. AM. LAW. REG.

THIS was an information against the apparatus of claimant used in the distillation of spirits. Among other breaches of the Internal Revenue Law it was charged that, between the 3d day of September 1864 and the 1st day of March 1866, claimant sold and removed from his distillery for consumption and use, 50,000 gallons of spirits by him manufactured and distilled, without first paying the duties required by law, and without having the spirits gauged and inspected, or the casks branded. To the information, claimant answered, "that the said several articles and property seized did not, nor did any part thereof become forfeited in the manner and form in the said information in that behalf alleged.

After all evidence in support of, and in answer to, the alleged forfeiture had been put in, claimant's counsel offered proof, that the facts substantially as here proven in support of the information had come to the knowledge of the collector and deputy collector of the district in the month of September 1866, and a seizure of the same property in the distillery had been then made, and not prosecuted. The proof was offered for the purpose of taking advantage of the limitation prescribed in section 68 of the Act of June 2d 1864 (13 Statutes at Large 248), authorizing seizures, provided "That such seizures be made within thirty days after the cause for the same shall have come to the knowledge of the collector, or deputy collector, and that proceedings to enforce said forfeiture shall have been commenced by such collector within twenty days after the seizure thereof." The evidence was objected to on the part of the prosecution as not responsive to the information and not evidence under the answer. The objection was overruled and evidence admitted.

The evidence showed an investigation of the affairs of Hodson, the claimant, by the collector of his district, and a seizure of the distillery in September 1866; a subsequent abandonment of that seizure; a further investigation by the collector, and a second seizure made in September 1867, upon which the present information was filed within the twenty days allowed by law.

The jury found for the United States, whereupon the claimant moved to set aside the verdict against him, upon the ground that it is against the law and the evidence.

MILLER, J.—The inquiry is in regard to the knowledge of the

collector and deputy collector of the cause for seizure more than thirty days before this seizure was made.

Knowledge of the cause for seizure means knowledge on the part of the officer of facts tending to establish a cause for seizure prescribed in the statute. Mere vague rumor or suspicion, or loose assertions of irresponsible persons are not sufficient. It must consist of or be founded upon such facts communicated to or ascertained by the officer from reliable sources, as *prima facie* to establish a fraud upon the law.

The facts relied on in support of this information, and substantially upon which the verdict was rendered, were known to the collector and deputy collector and to inspector Burpee, who is the informer, in the fall of the year 1866, a year before this seizure was made.

The evidence upon the subject of the statute limitation was submitted to the jury, together with all the evidence in the cause, with instructions upon the law of the case. The jury were charged that claimant can take advantage of the Statute of Limitation; and that the law requires prompt action on the part of revenue officers.

After much reflection I should not feel justified in disturbing the verdict upon the merits. Finding the verdict upon the evidence, mostly circumstantial, was no abuse of the prerogative of the jury. The evidence was sufficient to bring the mind to the conclusion, that the alleged cause of forfeiture was well founded. The impeached witnesses were sufficiently sustained and corroborated to authorize the jury in finding the verdict in part on their testimony. The means taken by claimant to procure counter affidavits from those witnesses no doubt prejudiced his case with the jury.

I will confine this investigation to the subject of limitation allowed to be raised at the trial upon the pleadings. The answer is in the nature of a plea of the general issue. It is a general denial of the facts alleged in the information. In cases of seizure this mode of pleading is allowable: Conkling's Treatise 590. Special pleadings in actions for penalties and forfeitures, or in criminal prosecutions, are almost entirely disused. A demurrer to an indictment is occasionally interposed. The general practice is either a motion to quash, or a motion in arrest, after a verdict of guilty. In criminal prosecutions, although a defendant may

plead to the jurisdiction of the court, there are but few instances in which he is obliged to have recourse to such a plea. He may take advantage of the matter under the general issue: Archbold Crim. Pl. 80.

In a case under the statute of 31 Elizabeth, which provides that all actions for any forfeiture upon any penal statute, shall be brought within two years, the court held that the defendant may take advantage of the statute on the general issue, and need not plead it: Buller's Nisi Prius 195. In *Johnson v. United States*, 3 McLean 89, the court did not permit the party indicted to take advantage upon *habeas corpus*, of the limitation of indictments, where the objection had not been made of record by plea. In *United States v. Ballard*, 3 Id. 469, the question of limitation was raised upon the date mentioned in the indictment, upon which the alleged perjury had been committed, and the act was held to bar the prosecution. In *United States v. Mayo*, 1 Gall. Rep. 396, there was a plea of the Statute of Limitation. But in *Parsons v. Hunter*, 2 Sumner 419-425, the same court declares in the opinion, that in suits on penal statutes, the Statute of Limitation need not be pleaded; but may be taken advantage of under the general issue.

By the 32d section of the Crimes Act of Congress (Statutes at Large 119) it is enacted, "That no person shall be prosecuted, tried or punished for treason or other capital offence, wilful murder and forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence shall be committed; nor shall any person be prosecuted, tried or punished for any offence not capital unless the indictment for the same shall be found within two years from the time of committing the offence. Provided, that nothing therein contained shall extend to any person or persons fleeing from justice." By Acts of Congress, the period of limitation for the prosecution of any crime arising under the Revenue Law, and suits for fines and forfeitures, is five years.

Cases arising under the act limiting prosecutions have been presented to the consideration of courts under different forms of pleading. In *United States v. Slocum*, 1 Cranch C. C. Rep. 485, the limitation was specially pleaded. In *United States v. Porter*, 2 Id. 60, the limitation was not pleaded. In *United States v. Wilson*, 3 Id. 441, the question was raised by demur-

rer. In *United States v. White*, 5 Id. 73, it is decided that limitation may be given in evidence by the defendant under the general issue in a criminal cause, and the United States may give in evidence the fact that defendant fled from justice, and therefore was not entitled to the benefit of the limitation. In the opinion, on page 82, the court remarks: "The court is bound to take notice that the defendant, upon the plea of not guilty, had a right to avail himself of the limitation of time, if he was entitled to it; and that the United States had a right to show that he was not entitled to its benefits." "If, from accident or ignorance of his rights, the defendant should have been prevented from asserting or using his right, it might be ground of a motion for a new trial." In the case of *Lee v. Clark*, 2 East 333, 336, an action of debt for a penalty given by the game laws, upon the plea of *nil debet*, the verdict was for the plaintiff. Lord ELLENBOROUGH, during the argument, said: "That notwithstanding the allegation that the offence was committed within six calendar months, yet if it were not computed within the time prescribed by the statute, the plaintiff must have been nonsuited." LAWRENCE, J., remarked: "The time having elapsed would have been evidence for the defendant on the plea of *nil debet*." See also 1 Chitty's Crim. Law 471, 475, 626; Espinasse on Penal Statutes 78.

The statute limitation seems to require that evidence of the time the officer obtained knowledge of the cause of forfeiture should be received under the general issue. It is an appropriate inquiry upon the trial of the cause. Proof on the subject might involve a more extended range than if the seizure were prohibited after or between certain dates. Seizure is an open and notorious act on the part of the officer, known to the party in possession; but on what day or time the cause of seizure came to the knowledge of the officer may have to be ascertained from proof of several facts.

From this examination of the subject, I am satisfied that the evidence was properly admitted, and that the verdict, under the instructions of the court upon this subject, should have been for claimant.

A question arises, What effect the repeal of section 68 has on this case, if any? The information charges the offences against the act to have been committed between the 3d day of September

1864 and the 1st day of March 1866. And the seizure is alleged to have been made on the 11th day of October 1867, under and in pursuance of the Act of June 30th 1864 and the acts amendatory thereof and supplementary thereto.

It is an established rule, that where an action for the recovery of a penalty, or a proceeding to enforce a forfeiture prescribed in a legislative act, is pending at the time of the repeal of the act, or instituted after the repeal, such repeal is a bar to the action or proceeding, in the absence of a saving clause in the repealing act.

A clause of the repealing act provides that the repeal shall take effect on the 1st day of September 1866. The Act of March 3d 1865 (13 Statutes at Large 472) continues in force section 68 of the Act of 1864. These two last acts were in force at the time of claimant's operations in the distillery, and for six months thereafter. The Act of July 1866, repealing section 68, provides, in section 70, "That all the provisions of former acts repealed shall be in force for collecting all taxes, duties and licenses properly assessed, or liable to be assessed, or accruing under the provisions of acts, the right to which has already accrued, or which may hereafter accrue under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof, and for carrying out and completing all proceedings which have been already commenced, or that may be commenced to enforce such fines, penalties, and forfeitures under said acts." It is therefore apparent that section 68 of the Act of 1864 remains in force as to this case, including the proviso of limitation, notwithstanding the repeal. The distillery apparatus was subject to seizure as forfeited for offences propounded in the information before the repeal affected the section in any manner; and the above provision of the repealing act reserves to the government the right to institute and prosecute these proceedings to enforce the forfeiture.

The court being satisfied that the seizure upon which this information is founded was not made within thirty days after the cause for the same had come to the knowledge of the collector and deputy collector, it is therefore ordered that the verdict be set aside and the information dismissed.

*United States Circuit Court, District of West Virginia,
August 1868.*

THE UNITED STATES v. BALTIMORE AND OHIO RAILROAD CO.¹

By the Act of Congress of 1864, receipts for goods delivered to a common carrier for transportation, being in effect inland bills of lading, were not subject to stamp duty.

A corporation is liable to indictment for the act of its officer or employee, in issuing papers which the law requires to be stamped, without the proper stamps, with intent to evade the provisions of the Act of Congress.

THESE were indictments numbered from 1 to 54, inclusive, for breaches of the Revenue Laws of the United States.

Fifty of these indictments were for issuing receipts for goods delivered to the defendant at their depot in Parkersburg, to be transported by them as a common carrier, to different points upon their road; and the remaining four for issuing receipts for moneys paid for tolls and transportation upon the road, without having United States revenue stamps affixed and cancelled.

To all of the indictments the defendant demurred.

George H. Lee, in support of the demurrer.—1. As to the receipts for freights in question, at the times they were issued, in 1865 and 1866, upon the true construction of the Revenue Laws of the United States then in force, such receipts being in legal effect inland bills of lading, were not subject to stamp duty. 2. As to both classes of receipts, to constitute the offence under the Act of Congress of unlawfully issuing papers required to be stamped without having the proper stamps affixed, the party issuing must have done so with the unlawful intent to evade the provisions of the act and to defraud the revenue, and such intent on the part of the platform-clerk or agent issuing the receipts for the company, if it existed, could not be imputed to a corporation having no sentient or visible tangible being, and existing only in contemplation of law; but the clerk, or agent himself only, and not the corporation as such, could be held criminally responsible for the unlawful act.

Smith, District Attorney, contra.—By direction of the court the argument was confined, at this stage of the case, to the first point.

¹ We are indebted for this case to G. H. Lee, Esq., counsel of defendant.—
EDS. AM. LAW REG.

CHASE, C. J. of the United States, after consultation, stated his opinion to be, that at the times the freight receipts in question were issued, they were not subject to stamp duty under the Acts of Congress then in force, and that the demurrers to the indictments upon them would have to be sustained.

JACKSON, D. J., stated that his first impression was that the terms of the Act of 1864 were sufficiently, comprehensive to embrace receipts for goods delivered to a common carrier for transportation, and to subject them to stamp duty; but that since he had heard the argument of the counsel, and had come to construe the Act of 1864, in connection with the several other acts of Congress *in pari materia*, his views had undergone a change, and if the question were now to be decided, he should not dissent from the opinion of the Chief Justice to sustain the demurrers. He added, however, that if the counsel so desired, division of opinion between the judges might be entered *pro forma* upon the record, so that the cases might be taken to the Supreme Court of the United States.

CHASE, C. J., said that upon the second point made by Lee for the demurrer, both the district judge and himself were inclined to think the demurrer could not be sustained, but that they were willing to hear argument upon it if necessary, or desired.

Upon this intimation of opinion, however, the cases were settled by counsel.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

COURT OF CHANCERY OF NEW JERSEY.¹

SUPREME COURT OF NEW YORK.²

SUPREME COURT OF VERMONT.³

BANK.

Negotiable Papers—Certificate of Deposit—Pleading.—The holder of a certificate of deposit, properly indorsed to him, and payable on presentation, cannot maintain an action thereon until special demand has been made: *Bellows Falls Bank v. Rutland County Bank*, 40 Vt.

¹ From C. E. Green, Esq., Reporter; to appear in Vol. 3 of his Reports.

² From Hon. O. L. Barbour, Reporter; to appear in Vol. 51 of his Reports.

³ From W. G. Veazey, Esq., Reporter; to appear in Vol. 40 Vt. Reports.

The plaintiff held a writing as indorsee in words and figures as follows: "No. 82, Rutland County Bank, Rutland, Vermont, March 11th 1863. This certifies that O. B. Clark, Esq., has deposited in this bank eleven hundred dollars, payable to the order of himself on the presentation of this certificate properly indorsed. \$1100. (Stamp, J. M., 1863,) James Merrill, Cashier." *Held*, that special demand should have been made before an action could be maintained to recover thereon. *Held*, also, that the same is negotiable within the meaning of the law merchant: *Id.*

BRIDGE.

Title to Public Bridge—Taking for different Public Use.—The title to the public bridges constructed by a county is vested in the board of chosen freeholders of that county. It is a corporation created for the purpose of representing the county and holding its property, and suits for the protection of such property are properly brought in the name of that corporation: *Freeholders of Monmouth County v. Red Bank and Holmdel Turnpike Co.*, 3 C. E. Green.

The bridges belonging to a county are public property held for public use, and are not within the protection of the constitutional provision which forbids private property to be taken for public use without compensation. The legislature has the power to direct in what manner such bridges shall be appropriated to public use, and may authorize them to be taken by a turnpike company for part of its road without compensation: *Id.*

When the charter of a turnpike company authorizes it to construct a road on a route which includes a public county bridge and requires it to pay to the owners of lands, over which the road should pass, all damages sustained, the compensation clause applies to a county bridge, which is included in the term *land*, and of which the county is the owner: *Id.*

Even if the damages by taking the county bridge would be only nominal, the county is entitled to restrain the turnpike company from using it as part of their road until the damages are assessed and the title of the bridge vested in the company, so that the county may be relieved from the obligation to repair it: *Id.*

When a turnpike company is entitled to take toll on two continuous miles of its road when finished, and a county bridge not purchased or acquired forms part of such two continuous miles, the taking toll on that section will be restrained until the bridge is acquired: *Id.*

CONSTITUTIONAL LAW. See *Bridge*.

Legislative control of Tide Waters—Riparian Owners.—Under the act to incorporate "The Keyport Dock Company" (Pamph. L. 1851, p. 25) "the dock or wharf now owned by the said company" must be construed to mean now owned by the individuals composing said company: *Keyport Steamboat Co. v. Farmers' Transportation Co.*, 3 C. E. Green.

By that act an adjoining shore owner is not deprived of the privilege, obtained by charter or license, of wharfing out in front of his own lands, even if it prevent vessels from landing at the side of the complainants' wharf: *Id.*

The exclusive right of the shore owner as supposed to exist before the Wharf Act of 1851, and as confirmed or conferred by that act, is to the

shore and lands under water *in front* of him, giving the same right to the adjoining shore owner, and *ex necessitate* excluding him from acquiring any right taking away the right of the adjoining shore owner : *Id.*

The act to incorporate the Keyport Dock Company cannot be construed, by mere implication, to take away the rights of the adjoining shore owner to the water in front of him ; and the power to enlarge and extend the wharf, though given by express words, must be construed so as to authorize such extension in front of lands of the company only : *Id.*

The question, whether in New Jersey the legislature has power to grant to a stranger the right to cut off a shore owner from access and other advantages of adjacency to the water directly in front of his shore along tide-waters, is an open one so far as any question is to be considered open upon which there is no judicial decision : *Id.*

It would seem that in the decision of *Gough v. Bell*, the Supreme Court and the Court of Errors were of opinion that the shore owner has vested rights in the waters in front of him that cannot be taken away by the state : *Id.*

Taking Private Property.—The legislature has no power, by special act, to transfer to one man the property of another without his consent either with or without compensation. This want of power does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of sovereign power committed to the legislature : *Coster v. Tide-Water Co.*, (Court of Chancery) 3 C. E. Green.

A grant of power to one man to improve the property of another, without his consent, at an annual compensation to be fixed by commissioners to be appointed for that purpose, not limited to the cost of the improvements, or the interest on the cost, or the benefit received by the property, but to be fixed by the arbitrary discretion of the commissioners, is a grant to one of profit out of the land of another to the extent that such compensation may exceed the cost or interest on the cost. It therefore is beyond the power of the legislature and void : *Id.*

The grant to one of the power to manage and improve the property of another without his consent and contrary to his judgment, even if exclusively for his benefit, is an infringement of the right of acquiring, possessing, and enjoying property guaranteed to every one by the Constitution : *Id.*

The power of eminent domain is a legislative power ; these by the Constitution are vested in the legislature. Private property may be taken for public use, but only on adequate compensation : *Id.*

The public use for which property may be taken by the power of eminent domain is the use of the property itself by the government or by the general public or some portion of it, not by particular individuals or for the benefit of certain estates : *Id.*

Whether the use for which property is taken is a public use is a question of law to be settled by the judicial power. Where the use is a public use the legislatures are the sole judges of the necessity or expediency of exercising the power of eminent domain in the particular case. But it cannot evade the constitutional limitation of its power, or make a private use a public use, simply by enacting that it is such : *Id.*

The laws regulating partition fences, party-walls, the enclosure of woodlands, the ditching and embanking of meadows, and other like police regulations, whether general or special laws, are an ancient branch of legislation. Their object is to regulate the management and enjoyment of property by the owners or a majority of them at their common expense, and they are a proper and constitutional exercise of legislative power: *Id.*

Taking Private Property without Compensation.—For the purpose of reclaiming large tracts of lands the rights of eminent domain and of taxation may be employed: *Tide-Water Co. v. Coster* (Court of Appeals), 3 C. E. Green.

Whether a scheme of improvement be of such public utility as to justify a resort, for its furtherance, to the power of taxation and eminent domain, is a matter to be decided by the legislature: *Id.*

By the charter of "the Tide-Water Company," commissioners were to be appointed who were authorized to make a contract with such company for the draining of large tracts of meadow-land, the property of various individuals—said commissioners being also empowered to assess upon said lands, when reclaimed, a just proportion of the contract price. *Held*, that such scheme was illegal and void, inasmuch as the expense to be levied on the land was not limited in amount to the extent of the benefit to be conferred: *Id.*

The cost of a public improvement may be imposed on the property peculiarly benefited; but the cost beyond this measure must be levied from the public at large: *Id.*

To compel the owner of property to bear the expense of an improvement, except to the extent of his particular advantage, is *pro tanto* to take private property for public use without compensation: *Id.*

CONVEYANCE.

When an Assignment and not a Lease.—An instrument, made since 1787, by one person to another, conveying lands in fee, in the state of New York, operates as an assignment, and not as a lease; and hence the strict relation of landlord and tenant is not created thereby: *Lyon v. Chase*, 51 Barb.

Presumption of Payment of Rent.—There is, therefore, no distinction between the covenant contained in such an instrument and other sealed instruments, so far as the presumption of payment or extinguishment is concerned: *Id.*

Where, in an action upon the covenant to pay rent, contained in such an instrument executed in 1799, there was no evidence to show that any rent had ever been paid upon it, during a period of sixty-four years, and it appeared affirmatively not only that the defendant had not paid rent within twenty-two years prior to the commencement of the action, but that the plaintiff had not claimed the same. *Held*, that upon these facts the law raised the presumption that the cause of action had been released, discharged, or extinguished, and the plaintiff could not recover: *Id.*

The presumption of payment, in such a case, will not be repelled by an admission of the defendant that there had been a general resistance and refusal to pay rent, for the last twenty-five years, by the tenants of the manor of which the lands in question constituted a part: *Id.*

CORPORATION.

Bonds and Bondholders—Coupons.—A coupon, payable to bearer, detached from a bond, and owned by one party, while the bond is owned by another, is still a lien under the mortgage given to secure the bond: *Miller and Knapp, Trustees, v. The Rutland and Washington Railroad Co. and Others*, 40 Vt.

The coupon, when payable, is a part of the mortgage-debt, and an assignment of a portion of the mortgage carries with it, in equity, a corresponding interest in the mortgage security; and the coupon holder, in a foreclosure of the mortgage, is entitled to a *pro rata* distribution with the holders of the residue of the mortgage-debt: *Id.*

The loss of a bond is no objection to its being paid, provided an indemnity is furnished against its being enforced in the hands of others: *Id.*

DEED.

Reservation.—Reservation of the use and occupancy for a stated period in a deed by the grantor, will not be determined either in whole or in part, if the grantor leases a portion of that which he has reserved, if the reservation is not explicitly personal in its terms: *Cooney v. Hayes and Others*, 40 Vt.

In construing reservations in deeds, the intent of the parties to be gathered from the nature of the subject-matter, and the language used, must control: *Id.*

ENGLISH LANGUAGE.

Signs and Figures.—The signs of degrees and minutes ($^{\circ}$ ') commonly in use to show the meaning of figures with which they are connected are not part of the English language within the statute of this state, which requires declarations and other pleadings to be drawn in the English language; and an indictment for not making a highway pursuant to an order of the court, which was described by courses and distances only, and in the description these signs were used instead of words, was held insufficient on demurrer: *State of Vermont v. Town of Jericho*, 40 Vt.

FIXTURES.

What are such.—The more sensible rule, in regard to what are to be deemed fixtures, seems to be that if articles are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose, and without such or similar articles, the realty would cease to be of value, then they may properly be considered as fixtures, and should pass with it: *Hoyle et al. v. The Plattsburgh and Montreal Railroad Co. et al.*, 51 Barb.

HUSBAND AND WIFE.

Marriage Settlement.—A marriage settlement, by which an intended wife conveyed to trustees all property which she then had, and to which she might thereafter become entitled, does not, at law, convey the after-acquired property. Equity will construe such instrument as a contract to convey and enforce its performance only when necessary to effect the plain intent of the parties: *Steinberger's Trustees v. Potter*, 3 C. E. Green.

Such settlement construed as an agreement to convey only such property as the wife might acquire *during marriage*: *Id.*

INSURANCE (FIRE).

What Property is covered by Policy.—The plaintiffs, as trustees of a railroad company, effected a policy of insurance with the defendants "on any property belonging to the said trust company, as trustees and lessees as aforesaid, and on any property for which they may be liable, it matters not of what the property may consist, nor where it may be, provided the property is on premises owned or occupied by the said trustees, and situate on their railroad premises in the city of Racine, Wisconsin." *Held*, that a dredge-boat belonging to the plaintiffs, in their employ in the city of Racine and attached to their wharf where the road terminated, was thereby in the plaintiffs' possession and annexed to the railroad premises, and therefore covered by the policy: *The Farmers' Loan and Trust Co. v. The Harmony Fire and Marine Insurance Co.*, 51 Barb.

Held, also, that whether the plaintiffs (a New York corporation) could hold real estate in Wisconsin must depend on the statutes of that state. But that so long as they were allowed to remain in possession and use the railroad property conveyed to them in trust, they had such an interest as would bring all their property connected therewith under the terms of the policy: *Id.*

LANDLORD AND TENANT.

Right to Assign.—The words "the right to use and occupy," are equivalent to the right to the use and occupancy, and import a general right in the grantors to use and occupy, either by themselves or others, limited only by the implied legal duty to occupy in a prudent manner: *Cooney v. Hayes*, 40 Vt.

A tenant has a right to occupy by himself, his agent, or assignee, unless restrained by express stipulations in the lease. It is not necessary that the word "assigns" should be used to give this right: *Id.*

MORTGAGE.

Separate Defeasance—Fraud on Creditors.—If a mortgage was given in the form of an absolute deed, and the defeasance withheld from the records for the purpose of misleading and delaying the mortgagor's creditors, the right of redemption will not thereby be lost. In such case, the aid of the court is not asked to enforce a fraudulent instrument. The fraud, if any, is in the deed, not in the defeasance which the complainant claims to enforce according to its legal effect. The defeasance is honest as between the parties, and was not to injure creditors: *Clark v. Condit*, 3 C. E. Green.

NEGLIGENCE.

A Question of Fact.—The question of negligence is peculiarly a question of fact to be determined by the jury; and the case must be very clear which will justify the court in withholding it from their consideration: *Wooden v. Austin*, 51 Barb.

NUISANCE.

Suit by Private Person.—The grant of a franchise to operate a railroad does not confer the right to use upon it locomotives so constructed as to throw out burning coals that may set fire to buildings along the line. But the road must be operated with engines so constructed as to cause the least danger: *King v. Morris and Essex Railroad Co.*, 3 C. E. Green.

That a building was erected after a railroad was laid out and constructed is no impediment to relief against any nuisance arising from operating the road. The owner of a lot does not lose the right of using it for any lawful purpose by reason of any erection on adjoining property, or any use to which the same was put while the lot was vacant: *Id.*

Where a nuisance is an injury to the property of an individual a suit to restrain it may be brought in his name, although many others are injured in the same way by it, and it is not necessary to proceed in the name of the Attorney-General. The proceeding must be in the name of the Attorney-General only in case of a public nuisance, which is a nuisance that interferes with the enjoyment of a public or common right: *Id.*

Where a defendant, who has been doing what amounts to a nuisance, disclaims the intention to continue it, and is proceeding with diligence to remove and abate it, the court will, if satisfied that the cause of complaint will be removed as speedily as practicable, refuse an injunction: *Id.*

PARENT AND CHILD.

Contract—Implied Promise.—The rule, that where a child, after becoming of age, remains in a parent's service, the law will imply no promise, on the part of the parent, to pay for the labor, but an express promise must be proved, applies also to adopted children: *Lunay v. Vantyne*, 40 Vt.

The plaintiff was an adopted daughter of the defendant. After it was understood she was of age, the defendant agreed to pay her for her labor. Subsequent to this agreement she and her foster parents learned that they had been mistaken one year in her age, that she, in fact, arrived at her majority one year earlier than she had supposed, and, consequently, had been in the defendant's service for one year after she became of age without pay, and without any agreement or expectation of pay. *Held*, that the law would imply no promise or contract to pay her for that year: *Id.*

PARTNERSHIP.

Arbitrament and Award.—The presence of one partner, who was a Frenchman, and understood English imperfectly, at, and participation to some extent in, a conversation between his co-partner and the defendant, concerning a matter in dispute between the plaintiff partnership and the defendant, which resulted in a submission by the copartner and the defendant of the matter to arbitration, *held*, not to be conclusive of the Frenchman's assent to the award, he not having understood that his copartner agreed to submit, and having never assented thereto: *St. Martin v. Thrasher*, 40 Vt.

A partner has no authority, by virtue of his relation as partner, to bind his copartner by a submission of a copartnership matter to arbitra-

tion, so as to make the award in pursuance of such agreement binding on the firm: *Id.*

Dissolution—Distribution of Effects.—If articles of partnership provide for its continuance during the existence of a lease renewable at the option of one of the partners, it is at the option of such partner to continue the partnership by renewing the lease, or to end it by refusing to renew. He has a right to refuse to renew for the purpose of ending the partnership: *Phillips v. Reeder*, 3 C. E. Green.

That a partner having the option to renew such lease and continue the partnership may have talked and acted as if he intended so to do, will not bind him to renew if he made no contract to do it: *Id.*

Upon the dissolution of a partnership in which the articles provided that the effects, on dissolution, were to be equally divided among the partners, the property and effects of the firm belong to the individuals who compose it as tenants in common; part of the former members of the firm cannot dispose of the property of any other member without his consent: *Id.*

If some of the members of a dissolved partnership dispose of the property of one of the partners without his consent, he may, at his option, call on them to account for its value: *Id.*

In many cases if some of the partners after dissolution continue the business with the property of the late firm, the retiring partner will be entitled to call on them for a share of the profits, as well as for his capital: *Id.*

But this principle will not be applied to a case when the chief contribution to the business was personal skill and labor, and a new partnership was formed with strangers, merely because some of the property of the retiring partner was used in the new business after being sold to the new firm by the continuing partners, without authority so to sell it: *Id.*

A majority of the partners of a firm that is dissolved, have no right, without judicial proceedings, to compel another partner to sell or divide the property, or to choose an appraiser for the purpose of valuation; or if he refuses, to choose appraisers themselves and purchase or sell his share at such valuation. But if they have appropriated or sold the property they must account to him for the real value of his share and interest thereon: *Id.*

Failure of one Partner to Pay in his Share of Capital.—A part of the partners cannot exclude from the partnership one of their number who has failed to pay in part of the amount which he agreed to contribute as his share of the capital; but if part of his capital has been paid in, accepted, and used, and the business has been commenced in the name of the firm, he is a partner until the partnership is legally dissolved: *Hartman v. Woehr & Stegmüller*, 3 C. E. Green.

A partner excluded from the business of the firm by the illegal acts of his copartners is entitled to an account of profits, and to his share of them until the partnership is legally dissolved; and is entitled to a decree of dissolution on the ground of such illegal exclusion from the business: *Id.*

REAL ESTATE.

Conversion.—The surplus of the proceeds of lands of a decedent, sold

by order of the Orphans' Court for the payment of his debts, above the amount needed for the payment of debts, retains the character of real estate, and upon the death of the person entitled thereto, will pass by succession as real estate. So also will the proceeds of lands sold by order of a court on proceedings for partition, because incapable of partition: *Oberle v. Lerch*, 3 C. E. Green.

Such proceeds retain their character of real estate for the purposes of succession until they vest in some person who is not an infant or lunatic, and who has capacity to change the nature of the estate, and who by accepting it as money, or doing some act recognising it as personal estate, gives it the character of personalty: *Id.*

The income from lands and the interest on the proceeds of the sale of lands are personal estate, and will, upon the death of an infant to whom they belong, be transmitted as such, while the lands and the proceeds of their sale pass as real estate: *Id.*

Where lands of an infant in another state are sold by partition proceedings there, if by the law of that state the proceeds are to be considered personal estate and to be transmitted as such, they will pass as such in this state, although they are at the death of the infant in the hands of the guardian appointed in this state, and the infant is a resident of this state: *Id.*

REPLEVIN.

Bond or Undertaking.—Where the plaintiff in an action for the claim and delivery of personal property, dies after the execution of an undertaking to him by the defendant for the purpose of regaining possession of the property, and before the trial, and another person is substituted in his place, as plaintiff, the person so substituted is the party entitled to recover, and as such, the undertaking takes effect in his favor as the plaintiff entitled to a return of the property: *Emerson v. Booth*, 51 Barb.

The defendant's liability becomes fixed on the recovery of a judgment by the plaintiff, either to return to the plaintiff the property, or to pay the value thereof, to the extent of the penalty: *Id.*

In a suit upon such an undertaking judgment may be rendered for the plaintiff for the penalty of the undertaking and interest thereon from the date of the judgment: *Id.*

STATUTE.

Construction.—The only just rule of construction of a law, especially among a free people, is the meaning of the law as expressed to those to whom it is prescribed and who are to be governed by it: *Keyport Steamboat Co. v. Transportation Co.*, 3 C. E. Green.

If the legislator who enacted the law should afterward be the judge who expounded it, his own intention which he hath not skill to express, ought not to govern. But circumstances known to all the public, such as what the law was at the time, or what it was supposed to be, are proper to be considered in looking for the intention of the legislature when not explicitly expressed: *Id.*

STREAMS. See Constitutional Law.

Rights of Riparian Owners.—Where an old division line between

lands lying on tide-water has for more than forty years been treated by the owners as extending over the shore or the lands between high and low water, and regarded as the division line of their right upon the shore, the line so recognised will be established as the line which will govern their rights to reclaim and appropriate the shore under the Wharf Act: *Stockham v. Browning*, 3 C. E. Green.

No rule for ascertaining the line by which the shore in front of co-terminous shore-owners shall be divided between them has been adopted in New Jersey. But if a line claimed by one of them is more favorable to the other than that given by any of the different rules adopted by the courts of the several states, he will be protected to the line so claimed unless a different line has been adopted by the owners, by acquiescence or otherwise: *Id.*

The owner of lands along tide-waters has an easement in the shore in front of them, and the inchoate right to appropriate them to his exclusive use. But until reclaimed the fee is in the state, and he cannot maintain ejectment. But as he has a vested right in the shore, he will be protected in equity against any encroachment on or appropriation of them: *Id.*

TRUST AND TRUSTEE.

Contributions to Fund for Specific Purpose.—The contributors to a fund, raised and placed in the hands of trustees for a specific purpose, have a right to have any surplus not needed for the object, repaid to them in proportion to their contributions. The claim is founded in equity and will be enforced in this court: *Abels and Others v. McKeen and Others*, 3 C. E. Green.

The fund is in the control of the association only for the purposes for which it was raised. It may be disposed of for any purpose within the object for which it was contributed at any regular meeting of the association, by the voice of the majority of the members present, even if a minority of the whole number: *Id.*

But the vote must be for some purpose for which the money was contributed. A majority cannot devote the money of the minority, or even of a single member, to any other purpose, without his consent: *Id.*

So surplus funds, contributed for enlisting men to fill the quota of a city or ward, under a call of the President, and to clear the contributors from draft, cannot, by a vote of the majority, be donated to a charitable institution, without the consent of the minority: *Id.*

All persons present at the meeting at which the vote is taken disposing of the fund, if no one dissents, are considered as voting with the majority for the motion and assenting thereto; their right to the fund is concluded. *Aliter*, as to those not present: *Id.*

Where, under a resolution of the majority, the surplus fund has passed into the hands of new trustees, between whom and the original contributors there is no privity, such trustees are not accountable to them for the fund; their remedy is against the original trustees only: *Id.*

Compensation to Trustee who has abused the Trust.—A trustee who has abused his trust, is entitled to no commissions as trustee but he will be allowed reasonable compensation for special and extraordinary services rendered to the *cestui que trust*: *Moore v. Zabriskie*, 3 C. E. Green.

TRUSTEE PROCESS.

Contingency.—Money held as security for becoming bail, does not depend on such a contingency as is within the meaning of the 6th section of chapter 34 of the General Statutes, and is not exempt from trustee process. The trustee, when discharged as bail, becomes accountable, under the trustee process, for said money, with the right only of retaining so much of it as is necessary to make good the indemnity for which he had received and was holding it: *Ellis & Co. v. Goodnow*, 40 Vt.

No agreement or arrangement between the debtor and trustee, after service of the trustee process, could change the relation in which they then stood, as to this money, so as to affect the plaintiff's right under his attachment: *Id.*

Evidence tending to prove previous acts, declarations, and agreements of the trustee with the plaintiff, were admissible to show the condition on which the trustee received the money, and as tending to prove a state of facts that would estop him from setting up a claim to the money after he was discharged as bail as against the plaintiff: *Id.*

WITNESS.

Competent when offered.—If a defendant in a suit dies after the complainant has been examined as a witness and his administrators are made defendants in his place, this evidence will be admitted at the hearing. The complainant was competent at the time when it was taken, and that is the test of admissibility. It cannot be rejected because the defendant was prevented from testifying by his death: *Marlatt v. Warwick*, 3 C. E. Green.

NEW LAW BOOKS RECEIVED BY THE PUBLISHERS OF THE
AMERICAN LAW REGISTER.

BROWNE.—A Treatise on The Companies Act, 1862, with special reference to Winding-up, for the purposes of Reconstruction or Amalgamation, &c. With Supplement containing The Companies Act of 1867, notes, and a Digest of Additional Cases. By G. LATHOM BROWNE, of the Middle Temple, Barrister at Law. 8vo., pp. 460, 73. London: Stevens & Haynes, 1867. Cl., 21s.

WISCONSIN.—Reports of Cases in the Supreme Court of Wisconsin, with Tables of the Cases and Principal Matters. By O. M. CONOVER, Official Reporter. Vol. 21, containing all the Cases decided before September Term 1867, and not previously reported. Madison, Wis.: Attwood & Rublee, prs., 1868. Shp. \$6.

THE
AMERICAN LAW REGISTER.

NOVEMBER, 1868.

THE CRIME OF ADULTERY.

THE trial of General George W. Cole for the murder of L. Harris Hiscox, which recently took place at Albany and resulted in the disagreement of the jury, was in some respects extraordinary, and gives rise to serious reflection. The parties were of the highest social standing. The accused had served with great distinction and usefulness in the Union army in the late war, having been promoted a number of times, and severely wounded. He is a brother of the United States Senator from California. The deceased was a prominent lawyer, who had occupied, with credit, several positions of political and pecuniary trust, and at the time of his death was a member of the Constitutional Convention of the State of New York, then sitting at Albany. Mrs. Cole, who was said to be the "*meritorious cause of action*," was of an old, wealthy, and influential family, and a woman of education, refinement, and social distinction. Her brother was also a member of the Constitutional Convention. The deceased had been the legal adviser and intimate friend of the accused.

The commission of the murder by the defendant was unquestioned. It occurred at a hotel in Albany, in the presence of several witnesses. The crime was characterized by some circumstances showing coolness and deliberation.

It appeared that the defendant, on his return from the war, having his suspicions excited, induced his wife to confess in writing, first, that during the husband's absence at the war, His-

cox had made repeated attempts to seduce her, which she claimed she had uniformly and successfully resisted, but which, through shame and fear of the effect on her husband, she had refrained from disclosing; and, by a subsequent statement in writing, that Hiscox had actually seduced her. Both statements were clearly dictated by Cole. After the procuring of these confessions, and the lapse of several days, during which time it was to be inferred from the evidence that he cohabited with his wife, and having meanwhile, although he owned and carried a pistol, purchased in addition a Derringer revolver, making especial inquiry as to the efficiency of the cartridges, he rode in company with his wife one hundred and fifty miles to Albany, with the avowed purpose of proceeding to Brooklyn, and there went with her to a hotel and took rooms. Then, going to the Stanwix Hall Hotel, he walked up to Hiscox, who was conversing with a friend, and, without the interchange of a single word, killed him by shooting him through the head with the Derringer revolver. After the commission of the act, he said to the bystanders that the dead man had been his bosom friend, but during his absence at the war had dishonored his wife.

In his opening at the trial, the defendant's counsel, who is perhaps the most adroit criminal lawyer at the New York bar, boldly and emphatically claimed an acquittal on the ground of justifiable homicide, quoting Scripture and twenty-eight adjudged cases, and expressly declaring that his client wanted no compromise verdict from the jury. He based his argument on the theory, that as the law metes out no punishment to the seducer, the injured man has a right to take the law into his own hands. He made no suggestion that his client was insane, but considerable evidence of insanity was adduced. The theory of insanity was founded by the physicians on the presumed effect of the incurable wounds and severe hardships which the prisoner had suffered in the war, on the chronic prostrate condition of his nervous system, and on the undoubted state of mental distress under which he labored at the time of the commission of the act; but it may be doubted whether, in the light of the counsel's opening address, and the conflicting evidence on the question of insanity, the jury placed any reliance on the idea that the accused was really not of mental responsibility. Of course, no proof of actual adultery was allowed to be given. The judge charged

strongly against the prisoner ; but the jury, after being out more than twenty-four hours, standing equally divided, were unable to agree, and were discharged. It was understood that the six in favor of conviction were willing to consent to a verdict of manslaughter, but the other six would agree to nothing but acquittal. After their discharge, the six in favor of acquittal in a body paid a congratulatory visit to the counsel for the prisoner, and also to the prisoner in his cell. The result of the trial is presumed to be equivalent to acquittal.

May not this case, then, be added to the long line of precedents which have substantially established the rule, that a man may with impunity slay the person whom he suspects of having seduced his wife ? and may it not also be hereafter cited as a precedent for the doctrine, that he may do this solely upon the warrant of the wife's confession ?

This case, therefore, presents two very singular propositions. First, that one may lawfully kill another upon mere suspicion of grievance ; and, second, that he may so kill him in a case where, even if his suspicion is well founded, and the offence has actually been committed, yet the offence is no legal justification for the revenge, and, with rare exceptions, has not been deemed by legislators of sufficient gravity to warrant any legal punishment of the person who commits it.

In other words, that private animosity may usurp the place of public justice, and society in this respect be reduced to elemental chaos ; that a private individual may lawfully take the life of his fellow-being where society and the laws would have no right to take life, or even inflict the slightest punishment. Is there not in this idea something radically and startlingly wrong and horrible, and well designed to give pause for thought ?

To countenance the individual in becoming, at his own option, the executor of established public laws, savors of a demoralized state of society ; but to applaud the individual when he not only constitutes himself the executioner, but himself makes the law which he executes, is a distinguishing mark of a barbarous and lawless community. And when we add to this that the community has looked calmly and approvingly on this course for a hundred years of enlightenment and civilization, and still persists in neglecting or refusing to render that legally penal which in effect it has so long farmed out to private revenge, it is truly one of

those obstinate anomalies, the existence of which goes to justify the belief among the theologians in the doctrine of innate total depravity, and in statesmen the despair of constructing a perfect political system.

In new and unsettled countries where laws exist but the executive power is weak, combinations of individuals have sometimes been temporarily tolerated for the purpose of preserving human life and property, but then only with great reluctance and debate, and for the shortest practicable period; and these departures from the ordinary procedure of civilized nations are regarded in the older and more settled communities with an extremely measured approbation, if not with positive disapproval. So great is the fear in conservative minds of possible injustice through hasty measures, excited passions, and the absence of legal forms, that the very name of "Vigilance Committee" raises the spirit of condemnation, and the query whether it is not better to "bear the ills we have, than fly to others that we know not of;" whether it is not better in the humane language of the law, that ninety-nine guilty should go unpunished than that one innocent should be harmed. And so these summary dealings have been tolerated only because they seemed unavoidable, very much as many arbitrary proceedings were justified during the late war by the plea of "military necessary." But in these same old and settled communities,—refined, educated, humane, Christian communities,—here in the state of New York, where we have been accustomed to regard human life as safe as human wisdom can make it, and the execution of laws as certain as human foresight can render it; where the excesses of the passions generated by a tropical sun, and the cheapness with which human life has seemed to be held in the Southern States of the Union have been so strongly and persistently reprobated; where legislators have had twenty-eight (now twenty-nine) solemn judicial warnings of the effects of neglected duty,—it seems yet, if we may judge from the defects of the statute-book, and the actual administration of law, to be the sentiment of the people, as it also seems the voice of the public press, that the individual is justified in deliberately taking the life of his neighbor for that which is in law no fault, no crime. With the exception of Massachusetts and Pennsylvania (so far as we know), adultery in the United States is nowhere judicially pro-

nounced a crime, but still is a full excuse for the taking of life by the private hand.

The omission in this particular is the more singular because we are so hedged and guarded on nearly every side by law. It is really curious to contemplate the number of things artificially unlawful. We have laws against almost every form of sumptuary excess and licentious and indecent conduct. It is against the law to utter a profane oath ; to disturb the public quiet on Sunday ; to sell intoxicating liquor without conforming to public requirements ; to drive fast through the streets ; to expose the person in public places ; to commit "the abominable and detestable crime against nature." We have laws punishing infringements on the proper relations of the sexes. It is against the law to commit rape, or to seduce an unmarried female under promise of marriage, and, in a number of communities, to commit fornication. A man may be criminally punished under certain circumstances for saying that his neighbor has seduced a woman ; but he cannot be legally punished for seducing that neighbor's wife. Adultery is not a crime within the law. Why not ? It is conceded to be a most heinous offence against morals. It tends to corrupt the purity of descent ; it outrages man's tenderest sensibilities ; it is against human conscience and divine law. It so shocks the moral sense that the guilty parties, male and female, are ostracised and denounced as bitterly perhaps as if they had conspired to destroy life, because the offence, although not against the public safety, is yet a violation of what the people hold nearly as dear—decency and decorum.

Again : How tender of human life is the law, at least in theory ! Nearly every form of homicide and of violence, or risk of violence to the person of one's self or of another, is forbidden. It is against the law for a man to commit suicide, and criminal to assist one in taking his own life. It is unlawful for two men to agree to run the risk of killing one another in duel. It is forbidden to give a man a black eye, to maim him, to engage in a prize-fight, to fire a gun off in a crowded place. It is even illegal for Sam Patch to jump over Genesee Falls, or for Blondin to walk a tight-rope across the Niagara. The law even goes so far as to make provision for the protection of the mere germ of human life in the womb, in order to prevent the destruction of that which may possibly become a sentient being, and so we have laws

against striking a pregnant woman, against procuring abortions, and even against advising the pregnant woman to take medicines with that purpose. And it is not human life alone of which the law is in theory so tender, but it extends its protection over the brute creation, and forbids cruelty to animals. Mr. De Bergh, of New York, has spent his life in enforcing this latter class of laws, and deservedly obtains the admiration and thanks of his countrymen; and Hogarth proved himself even a greater philosopher than painter by depicting the growth of unrestrained brutality in the human heart in the "Four Stages of Cruelty."

But this same society, so careful of human and brute life; so averse to cruelty in every form; that sickens and grows faint at the sight or mere report of bloodshed; that feels a thrill of horror when the daily newspaper tells them that a thousand miles away some poor man is crushed out of existence by the whirling belt or the rushing railroad train; that shudders at the appointment of a judicial execution in its midst, and deafens the ear of the government with appeals for commutation or respite; that society yet deliberately and wilfully places the sword of vengeance in the hand of an infuriated wretch, and bids him work his reckless will on his brother who is supposed to have injured him; and after private vengeance is glutted, makes him the hero of the hour, and applauds the violation of law and justice. For this is the effect of the twenty-nine American precedents. When Cole killed Hiscox had he not a right to rely on the precedents, then twenty-eight in number? He clearly had, and they carried him through his ordeal.

It is hardly necessary to point out the dangers of allowing the individual to become the judge of his own wrong, and the executioner of the justice of his own imagination. In the cases under consideration there is room for gross mistake or corrupt conspiracy. It amounts simply to this: that one tells another to commit murder, and both are absolved from blame. A man is suddenly and violently sent to his grave, not only without any legal proof of his offending, but without any warrant for suspicion that he has offended, save a confession extorted from his alleged paramour, self-contradicted and at least as guilty as himself. Society will even pronounce the woman the more guilty, and yet sanction and applaud the husband, after his hands are washed of the victim's blood, in receiving the wife again to his bosom. It

does not require any stretch of imagination, nor is it outside the bounds of every-day possibility, to witness, under such conditions, the enacting of a tragedy more causeless and more piteous than Othello's. Given the ordinary passions of the human heart, the unrestrained rage of a jealous husband, and the fury of "a woman spurned," and we have the ready materials of the deepest woe and the most harrowing remorse.

In view of these things, we cannot escape the conviction, that Christianity and civilization have not yet effectually purged the tiger out of men. There still remains much to be done to obliterate the marks that distinguish barbarous from enlightened communities. There is frequently a feeling in the community that the administration of the laws is not severe enough. There is always a large class of unthinking persons ready to find fault if a criminal is allowed to go at large on bail, or if he receives a milder punishment than uninstructed public opinion would deem it just to inflict. Tribunals are denounced for not doing "substantial justice," in disregard of oaths, evidence, and the letter of the law. There is a frightful amount of this mob-spirit even among intelligent and reasonable citizens. But the remedy for the state of things complained of is legislation—not lynching. "Substantial justice" is certain oppression. The lamp-post and the paving-stone are unsafe instruments, and an enraged and howling crowd are unreliable ministers, of justice.

To advance everything that is humane and equitable should be the object of the law and the aim of legislators. Now, if there is an offence that in the opinion of society substantially justifies summary and deadly punishment at the hand of an injured citizen, why not make that offence a statutory crime, and visit upon both the participants the severe penalties of the law? This would be in accordance with the theory upon which, and the purposes for which, society is instituted, and would answer several useful ends. It would take away the excuse for private vengeance, which, if then indulged, would become in law as it is in morals a greater crime than that which instigates it. Society cannot be benefited by tolerating murder because of adultery. Two wrongs cannot make a right. But let law affix to the breast of the adulterer the "scarlet letter" of its condemnation, and if it does not diminish the amount of the one crime, it will at least restrain the commission of the other. It would also deal out a just

measure of punishment for the crime. If adultery is justly punishable by death, let the guilty parties die ; but if it is not deemed deserving of so grave a penalty, then certainly it will not be affixed, and this in itself would be a striking evidence of the gross injustice of the present practice. Again, it would or should punish both the criminals. The woman, sinning against the natural purity of her sex, is the more blameworthy, especially where, as in the Cole case, she does so in spite of every artificial advantage of education and precept. In a state of refined society, if woman were impregably pure, men could not thus sin. Once more, immunity from punishment is direct encouragement to crime. The possibility of active vice without retribution ought never to be tolerated in theory. In case of discovery, the husband might be restrained by Christian motives from the commission of unavailing violence, but if the law should promise to interpose its arm and surely crush the offenders, men would always hesitate, and sometimes turn aside. And, finally, it would teach the lesson which men are so loath to learn, that the object of punishment is not revenge, but correction. Vengeance belongs but to One. It is not for man to wield the thunderbolt of offended Divinity. This is the most solemn and weighty reflection in connection with the subject. It is an awful thing to take human life, even in pursuance of judicial decrees, and the act should be surrounded by all the sanctions of law, and conducted with dignity and order. It should be resorted to only in the last extremity, for the safety of aggregated mankind and as the most fearful example to offenders. How then can those Christian gentlemen who are opposed to capital punishment, both conscientiously and as matter of governmental policy, look so indifferently, or rather half approvingly, on these irresponsible murders which have so long stained the annals of jurisprudence ?

We do not wish to prejudice the case of Cole. Perhaps he ought as matter of precedent to be acquitted. It would be better to let him go than to do him the remotest possible injustice. But when, under the shadow of the state capitol, a man who has come thither by the selection of his fellow-citizens, to advise in the reformation of the fundamental law of the Commonwealth, and in the correction of legal abuses, is boldly and defiantly murdered, and his murderer not only asks for acquittal but for the applause of society, and the murderer's counsel can success-

fully justify the act to the jury on the ground of a defect of law and justice, it is time that something were done to remedy such a palpable evil, and to end this line of ghastly precedents.

TROX, June, 1868.

RECENT AMERICAN DECISIONS.

Supreme Court of Connecticut.

CLARA HEWISON, ADMINISTRATRIX, v. THE CITY OF NEW HAVEN.

Any object in, upon, or near the travelled path of a highway which would necessarily obstruct or hinder one in the use of the way for the purpose of travelling thereon, or which from its nature and position would be likely to produce that effect, will, as a general rule, constitute a defect in the highway.

But those objects which have no necessary connection with the road-bed or relation to the public travel thereon, and the danger from which arises from mere casual proximity and not from the use of the road for the purpose of travelling thereon, will not, as a general rule, render the road defective.

Where a flag was suspended by private individuals across a public street of a city, with iron weights at the lower corners which were liable to become detached by the motion of the flag in the wind and to fall upon persons passing below, and one of the weights became detached in this manner and fell upon and injured a traveller on the highway who was in the exercise of reasonable care, it was *held*, that the city was not liable for the injury under the duty imposed upon it by law to keep the street "in good and sufficient repair."

An allegation of duty without stating the facts which raise the duty, is insufficient; and if the facts stated do not raise the duty alleged, the allegation of duty is immaterial.

ACTION on the statute "concerning highways and bridges," which gives a right of action for injuries received by means of any defective bridge or road against the town or other corporation which ought to keep the same in repair; brought by the plaintiff as administratrix of James Hewison, deceased, in the Superior Court in Fairfield county.

The declaration was as follows: "That on the 1st day of November 1864, a certain street and highway in said city of New Haven, and running through said city, known as Chapel street, which it was the duty of the defendants, under and by force of their said act of incorporation, to keep in good and sufficient repair and free from nuisances and obstructions which would endanger the safety of persons travelling thereon, at a place in

said city a little northerly of the intersection of said street with Church street, so called, was, through the neglect of the defendants, insufficient, defective, and dangerous to persons travelling over and along the same, by reason of a large piece of cloth being suspended perpendicularly over and across the same about twelve feet above the level of said street, and attached to buildings on each side of said street, by persons unknown to the plaintiff, with heavy iron weights attached to the same in such manner and so insecurely that the said weights were liable to fall, or by force of the wind operating upon said piece of cloth, to be projected with great force upon and against persons travelling along said street. And the plaintiff says that on the day and year last aforesaid the said James Hewison was passing along said street, at or near the portion of the same across and over which said piece of cloth was suspended as aforesaid, and then and there one of said iron weights so attached to the said piece of cloth as aforesaid, was, by force of the wind blowing the said piece of cloth, and by reason of being so insecurely attached to the same as aforesaid, thrown and projected against the said James Hewison, striking him upon his head and breaking his skull, whereby the said James was subjected to great pain and suffering, and in consequence whereof he afterwards, to wit, on the day and year last aforesaid, died; whereby and by force of said statute the defendants became and are liable to pay to the plaintiff, as administratrix as aforesaid, the damages which the said James Hewison sustained as aforesaid, which she says are ten thousand dollars; for the recovery of which said damages an action has accrued to the plaintiff, as administratrix as aforesaid, the defendants never having paid the same, though often requested and demanded; which is to the damage of the plaintiff, as such administratrix, the sum of ten thousand dollars, for the recovery of which, with costs, this suit is brought."

The defendants demurred to this declaration, and the case was reserved, on the demurrer, for the advice of this court.

C. R. Ingersoll and Watrous, in support of the demurrer, cited *Chidsey v. Canton*, 17 Conn. 475; *Borough of Stonington v. States*, 81 Id. 213; *Vinal v. Dorchester*, 7 Gray 421; *Hixon v. City of Lowell*, 13 Id. 59; *Keith v. Easton*, 2 Allen 552; *Barber v. City of Roxbury*, 11 Id. 318; *Ray v. City of Man-*

chester, Am. Law Reg. Feb. 1867, 250; *Kidder v. Dunstable*, 7 Gray 104; *Shepherd v. Chelsea*, 4 Allen 118.

Beardsley, contra, cited *House v. Metcalf*, 27 Conn. 632; *Dimock v. Town of Suffield*, 30 Id. 129; *Drake v. Lowell*, 13 Met. 292; *Bigelow v. Randolph*, 14 Gray 543.

CARPENTER, J.—The law is well settled that an allegation of duty without stating the facts which raise the duty is insufficient. It is equally true that if the facts stated do not raise the duty alleged, the allegation of duty is immaterial: *Priestly v. Fowler*, 3 Mees. & Wels. 1; *Seymour v. Maddox*, 5 Eng. L. & Eq. R. 265; *Hayden v. Smithville Manufacturing Company*, 29 Conn. 548.

In this case the duty alleged has reference solely to the removal of the obstruction or nuisance which caused the injury; and the character and situation of the nuisance are particularly described in the declaration. This duty is further limited in the declaration, as arising from the general statute concerning highways and bridges. The declaration contains but one count, and that is founded upon the statute. We have no occasion therefore to inquire whether the city charter imposes upon the defendant the duty contended for by the plaintiff. If the statute in question imposes no such duty, it is manifest that the declaration is insufficient.

The 1st section, page 492, makes it the duty of towns to "make, build, and keep in good and sufficient repair, all the necessary highways and bridges within the limits of such towns." The 6th section is designed to enforce this duty, and is as follows: "If any person shall lose a limb, break a bone, or receive any bruise or bodily injury, by means of any defective bridge or road, the town, person, persons, or corporation, which ought to keep such road or bridge in repair, shall pay to the person so hurt, or wounded, just damages."

The duty of keeping this highway in repair, prior to 1862, rested upon the town of New Haven; but the legislature of that year transferred this duty, and consequently the liability, from the town to the city. The duty of the city since that time in no respect differs from the duty of the town before. The statute must have the same construction, whether applicable to a town or

city; so that the broad question is here presented, whether an object suspended over the highway entirely out of the way of travellers, yet dangerous to them by reason of its being insecurely fastened, renders such way defective. This precise question was involved in the discussion of the case of *Jones v. The City of New Haven*, 34 Conn. 1, but a decision of it being unnecessary to a disposition of that case, it was left undetermined. In that case it was not seriously contended that no *duty* rested upon the defendant in respect to the matter which caused the injury; but it was strenuously urged that, inasmuch as the duty was a corporate one for public purposes, the defendant was not *liable for a breach of the duty*, unless expressly made so by statute. The principal question there was whether *liability* attached to a breach of duty. We held that it did. The question here is whether any *duty* rested upon the defendant. There is a further distinction between that case and this, in respect to the liability, if it be conceded in this case that the defendant has been guilty of any breach of duty. In that case we held the defendant liable, not under the general statute upon which this suit is brought, and which imposes duties upon towns *without their consent*, but under the city charter, by accepting which the defendant, for a consideration, *voluntarily* entered into a contract with the public to discharge the duty in question. This distinction is an important one, as will be seen by a reference to the opinion in that case. But the question now before the court is one of duty, and not of liability for a breach of duty.

The decision of this case must obviously depend upon the construction to be given to the statute upon which it is brought.

It must be borne in mind that, while every defect in a highway which obstructs, hinders, or endangers travellers thereon is a nuisance, yet it is not every nuisance which obstructs, hinders, or endangers travellers upon a highway that constitutes a defect of the highway within the meaning of this act. In *Hizon v. City of Lowell*, 13 Gray 59, the court say: "The traveller may be subjected to inconvenience and hazard from various sources, none of which would constitute a 'defect or want of repair' in the way for which the town would be responsible. He might be annoyed by the action of the elements; by a hail-storm, by a drenching rain, by piercing sleet, by a cutting and icy wind, against which, however long continued, a town would be under no obligation to

furnish him protection. He might be obstructed by a concourse of people, by a crowd of carriages; his horses might be frightened by the discharge of guns, the explosion of fireworks, by military music, by the presence of wild animals; his health might be endangered by pestilential vapors, or by the contagion of disease; and these sources of discomfort and danger might be found within the limits of the highway, and continue for more than twenty-four hours, and yet that highway not be, in any legal sense, defective or out of repair. It is obvious that there may be nuisances upon travelled ways for which there is no remedy against the town which is bound by law to construct and maintain the way. If the owner of a distillery, for example, or of a manufactory adjoining the street of a city, should discharge continuously from a pipe or orifice opening toward the street a quantity of steam or hot water, to the nuisance and injury of passers-by, they must certainly seek redress in some other mode than by an action for a defective way. If the walls of a house adjoining a street in a city were erected in so insecure a manner as to be liable to fall upon persons passing by, or if the eaves-trough or water conductor was so arranged as to throw a stream from the roof upon the side-walk, there being in either case no structure erected within or above the travelled way, it would not constitute a defect in the way."

A water-wheel may be a nuisance that will render the *owner* liable civilly to a persons who sustain an injury thereby: *House v. Metcalf*, 27 Conn. 631. So also spring-guns, set outside the limits of the highway, which endanger passers by, are a nuisance, and the person setting them may be indicted, and would be liable to an action at the suit of a party injured: *State v. Moore*, 31 Conn. 479. Other instances might be given, but it is unnecessary. In any of these cases it would be a novel doctrine to hold that a highway surveyor would have a right, by virtue of his office, to interfere and abate or remove the nuisance.

But other nuisances exist concerning which there is more doubt, and to them we will now turn our attention.

The plaintiff claims that it was the duty of the city to keep the highway free from nuisances, either upon or over it, which would render it unsafe or inconvenient for public travel. The defendant claims that a road can only be rendered defective by something in or upon the road-bed itself. We think the plaintiff's claim is

too broad. We are not prepared to establish the doctrine that everything which renders the highway unsafe makes it defective within the meaning of this act. Such a construction would impose heavy and unnecessary burdens upon towns. It would in effect make them insurers, for the time being, of the safety of travellers upon the highway; a liability to which the legislature never intended to subject them. If they had so intended, it must be presumed that they would have expressed such intention in clear and unmistakeable language. They have not only failed to do this, but the language used, taken in connection with other parts of the statute, shows that such was not their intention.

It seems to have been a matter of doubt whether a bridge, or a part of the highway raised above the adjoining ground, although dangerous, was defective; and hence a railing was expressly required at such places for the purpose of protecting the "*safety of travellers.*"

Here then was one danger specially provided for. The legislature must have been aware that other dangers existed, or might exist, and yet they made no provision for them. What is the inference? Not only that they did not suppose that the language used was broad enough to embrace every possible danger, but also that they did not intend to make towns liable in cases not expressly provided for. We ought not therefore to extend this statute by construction: *Chidsey v. Canton*, 17 Conn. 475.

On the other hand, we think the construction contended for by the defendant is too limited. To construe the word "defective" as applying to the road-bed only, would partially defeat the purpose which the legislature had in view; for it is obvious that there may be objects off the road-bed, yet so near it, either on one side or over it, as seriously to impede the public travel. That it was intended to make it the duty of towns to keep the highway clear of such obstructions seems hardly to admit of a doubt.

To define in general terms the precise limits of the duty of towns in these cases is not an easy matter, as each case must depend very much upon its own peculiar circumstances. The following, however, may be an approximation to it. Any object in, upon, or near the travelled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of travelling thereon, or which, from its nature and position, would be likely to produce that result, would generally constitute a

defect in the highway. For example, branches of a tree hanging over the road-bed near the ground necessarily obstruct the use of the way, and should be removed by the town; and any object upon or near the travelled path, which, in its nature, is calculated to frighten horses of ordinary gentleness, being likely to obstruct the use of the way, may constitute a defect in the way itself. In these cases the use of the way necessarily co-operates with the nuisance in producing the injury; neither the use of the way, nor the nuisance will of itself have that effect. If the two combined will necessarily or probably result in harm, it seems fair to presume that it was the intention of the legislature to make the town responsible for the removal of such a nuisance.

On the other hand, those objects which have no necessary connection with the road-bed, or the public travel thereon, and which may expose a person to danger, not as a traveller, but independent of the highway, do not ordinarily render the road defective. For example, trees or walls of a building standing beside the road, and liable to fall by reason of age and decay, or from other cause; or any object suspended over the highway so high as to be entirely out of the way of travellers; these, and like objects, may be more or less dangerous, but they do not obstruct travel. A person may be injured by them, but the use of the way, as such, does not necessarily conduce to the injury; he will be quite as likely to be injured while standing on the way, as while in motion; quite as likely to be injured while off the way as while on it. The tree or other object may or may not fall; it may or may not fall upon the highway; if it does, it may or may not fall upon a person travelling thereon; such a coincidence may possibly occur; but it is certainly not to be expected as a probable event. Such objects may be nuisances, which ought to be removed; but the act in question has not imposed that duty upon towns. The cause of injury in this case belongs to the latter class of nuisances; and the injury itself seems to have been the result of accident, rather than of any breach of duty on the part of the city.

An examination of a few of the cases cited in the argument will confirm the views above expressed. In *Chidsey v. Canton*, 17 Conn. 475, the plaintiff's wife and daughter were injured by the neglect of the town, in consequence of which he had lost

their services and had incurred expense in nursing and caring for them. The action was brought to recover the damages thus sustained. It was decided that he could not recover, the court refusing to extend the operation of the statute beyond the plain import of the words used.

In the case of *Dimock v. Town of Suffield*, it was held that a nuisance outside of the travelled path might constitute a defect in the highway; but that to make the town liable for neglect to remove such an object the case should be a very clear one.

In Massachusetts they have a statute much more comprehensive than ours. It provides that "all highways shall be kept in repair, so that the same may be *safe* and convenient for travellers, at all seasons of the year." And again: the surveyor of highways has power "to remove all gates, bars, enclosures, or other things that shall in any manner obstruct or encumber any highway, or incommode or *endanger* persons travelling thereon."

Under this statute the court held, in *Drake v. Lowell*, 13 Met. 292, that it was the duty of the city to remove a defective awning projecting over the sidewalk from an adjoining building. But in *Hizon v. Lowell*, 13 Gray 59, the court refused to extend the operation of the principles of that decision to a case where the only defect in the highway was the projection, from the roof of a building, of a mass of snow and ice which had gradually collected upon it, and had slid and been pressed forward by the snow above it, until it overhung the travelled way, and rendered passing beneath it dangerous. In the latter case the court say: "In most cases the town has discharged its duty when it has made the surface of the ground, over which the traveller passes, sufficiently smooth, level and guarded by railings, to enable him to travel with safety and convenience by the exercise of ordinary care on his own part. There may be many causes of injury to which he might be exposed in travelling upon such a way, which would not constitute any defect or want of repair in the way itself. The town, if it has done its duty in making the way safe and convenient in all the proper attributes of a way, is not obliged to insure the safety of those who use it." Again: "The liability of towns for injuries caused by defective ways is created by statute; and is not to be extended by construction beyond the limits which a reasonable interpretation of the statute establishes."

We think these principles are sound and applicable to this case. The plaintiff's declaration is insufficient. In this opinion the other judges concurred.

The foregoing case, although somewhat at variance, perhaps, with some of the earlier American cases on the subject of the extent of the responsibility of towns for defects within the limits of the laid-out highway, but not upon the travelled path, seems to conform to the more recent decisions bearing upon the question. Indeed it may be fairly said, we think, that the courts have found juries so ready to divide losses occurring upon highways among the inhabitants of the municipality, without much reference, often, to the precise cause of such losses, that there seemed to be a kind of necessity to interpose the most stringent rules of law in order to protect such municipalities from unjust claims.

And some of the efforts in this direction seem to us more nice than wise. Thus, in *Palmer v. Andover*, 2 Cush. 600, the general rule that towns are responsible for damage resulting from the combined causes of inevitable accident and the defect of the highway, without which it would not have occurred, is fully recognised, as in many earlier cases; *Hunt v. Pownal*, 9 Vt. R. 411, and others adopting the same view. But in *Davis v. Dudley*, 4 Allen 557, it seems to be considered that a town is not responsible in damages if a horse being frightened, by accident, breaks away from his driver and escapes from all control, and afterwards, while running at large, meets with an injury through a defect in a highway. It would seem, with reference to the two causes here alleged as the combined causes, and only alleged causes of the damage, as if the case must come within the principle of the other cases just quoted. But the argument in the opinion in this case rests mainly upon the point that the

plaintiff could not have been in the exercise of ordinary care at the very moment the damage occurred. And if this is to be regarded as the ground of decision, the cases may be held consistent with each other. But in that view, the head-note does not give the true point of decision, as Lord CAMPBELL was fond of saying, the *ratio decidendi*. And the learned judge here recognises that the opinion he was delivering seemed at variance with the reasoning of the same court, at an earlier day, upon a somewhat similar case, *Howard v. North Bridgewater*, 16 Pick. 189. We should prefer giving the later case a construction consistent with the general rule in other cases, that where the injury is the combined result of pure accident and the defect in the highway, the municipality is responsible. But there are some cases, in other states, which will not admit of any such construction, and really seem to hold that the injury, to be a good cause of action, must result exclusively from the defect in the highway, which we believe seldom occurs: *Moore v. Abbott*, 32 Me. R. 46; *Moulton v. Sandford*, 57 Id. 127, Chief Justice APPLETON dissenting. It is undoubtedly true that if the primary cause of the injury was some defect in the plaintiff's apparatus for travelling, or anything else for which he is responsible, and which he might have guarded against by the exercise of the proper degree of care and watchfulness, he cannot recover, because he was himself in fault in regard to a matter directly contributing to the loss: *Rowell v. Lowell*, 7 Gray 101. But where the plaintiff is not in fault and the damage occurred from pure accident and the defect of the highway, the true rule unquestionably is, that the town is responsible.

But defects in highways, to be any ground of action for injuries occurring in consequence, must be some obstruction to the passage of the traveller, and ordinarily this obstruction must be within the travelled portion of the highway. Thus, in *Keith v. Easton*, 2 Allen 552, it was held the town was not responsible for damage accruing to the plaintiff by his horse being frightened by a daguerian saloon allowed to remain partly within the limits of the highway, but several feet outside of the travelled path. And in *Barber v. Roxbury*, 11 Allen 318, it was held that a rope stretched across the highway and in temporary use, is not a defect or want of repair in

the highway for which a city is liable to a traveller who receives an injury from coming into collision with it while it is in motion from human agency. And in *Kingsbury v. Dellow*, 13 Allen 186, it was held, after elaborate examination and consideration, that an object in the highway, with which the traveller does not come in collision or contact, and which is not shown to be an actual obstruction in the way of travel, is not to be deemed a defect in the highway, for the reason that it is of a nature to cause a horse to take fright, which occurred in the present case, whereby serious damage occurred.

I. F. R.

*District Court of the United States, Eastern District of
Pennsylvania.*

CASE OF THE DISTRICT ATTORNEY OF THE UNITED STATES.

The term for which the incumbent of an office, whose duration was limited by law, had been appointed by the President with the concurrence of the Senate, expired when the Senate was in session. No appointment in which the Senate concurred was made at that session, and the President, in the ensuing recess, appointed another person to the office by a commission to expire at the end of the next session of the Senate.

It seems that the former incumbent's term was not extended by the Tenure of Office Act of 2d March 1867; and that as he had been appointed before that act, Congress could not constitutionally have prolonged by it his official tenure, without a new appointment by the President, and concurrence of the Senate, as to the additional period.

It seems also that the commission of the subsequent appointee was of no effect, the vacancy not having *happened* during a recess of the Senate, and the President, therefore, having no constitutional power to make a temporary appointment.

PROCEEDINGS upon the question of incumbency of the office of Attorney for the United States in the Eastern District of Pennsylvania.

The question depended principally upon the effect of two clauses of the Constitution. One of them provides that the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint all officers whose appointments are

not otherwise provided for in the Constitution, and which shall be established by law. The other clause provides that the President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

The 1st section of the Act of Congress of the 2d of March 1867, known as the Tenure of Office Act, is in the words—

“Every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.”

The provision of the section which follows applies only to the heads of the executive departments of the government. The 2d section authorizes the President, during the Senate's recess, to suspend for reasons and upon evidence to be reported by him to the Senate, within twenty days after the commencement of their next session, all officers except judges of the courts of the United States; and to designate a suitable person to perform, temporarily, the duties of any such officer until the Senate's next meeting, and their action upon the case; but does not authorize the removal of the former, incumbent, unless the Senate concur in the suspension and removal. The 3d section enacts—

“That the President shall have power to fill all vacancies which may happen during the recess of the Senate, *by reason of death or resignation*, by granting commissions which shall expire at the end of their next session *thereafter*. And if no appointment by and with the advice and consent of the Senate shall be made to such office so vacant or temporarily filled as aforesaid, during such next session of the Senate, such office shall remain in abeyance without any salary, fees, or emoluments attached thereto until the same shall be filled by appointment thereto by and with the advice and consent of the Senate; and, during such time, all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.”

The words of the 4th section are—

“That nothing in this act contained shall be construed to extend the *term* of any office, the duration of which is limited by law.”

The office of attorney for the United States was established in every judicial district by the Judiciary Act of 24th September 1789. By the Act of 15th May 1820, the duration of the term of the office was limited to four years. By an Act of 2d August 1861 the attorney-general was charged with the general superin-

tendence and direction of the attorneys and marshals of all the districts, as to the manner of discharging their respective duties ; and they were required to report to him an account of their official proceedings, &c., as he might direct. By the same act the attorney-general was empowered, whenever in his opinion the public interest might require it, to employ and retain, in the name of the United States, such attorneys and counsellors at law as he might think necessary to assist the district attorneys in the discharge of their duties.

Before the Tenure of Office Act Charles Gilpin, Esq., was, during a session of the Senate, appointed to the office of attorney for the United States in this district by the President, with the advice and consent of the Senate, for a term of four years, which expired *when the Senate was in session*, on 15th March 1868. For more than five months after this expiration of Mr. Gilpin's term he acted constantly, in and out of court, as the incumbent of the office, and was constantly recognised as such incumbent in correspondence and in other modes by the attorney-general and the officers of other executive departments of the government.

On 20th April 1868, however, the President, during the same session in which Mr. Gilpin's term of office expired, had nominated John P. O'Neill, Esq., to the office. On 27th July 1868 the Senate adjourned without having acted upon this nomination.

This adjournment was under a joint resolution, of 22d July, that the President of the Senate and Speaker of the House of Representatives should, on the 27th of that month, at noon, adjourn their respective Houses until 21st September, and on that day, *unless it should be then otherwise ordered by the two Houses*, should further adjourn their respective Houses until the first Monday of December.

On Saturday, 22d August 1868, the President appointed Mr. O'Neill to the office by a commission to expire at the end of the next session of the Senate. On Monday, 24th August 1868, Mr. O'Neill saw the judge at chambers. He was desirous that the judge should administer the oath of office to him, and that it should be filed in the clerk's office of this court. Mr. Gilpin was not present, the state of his health not admitting of his absence from his own house. But he sent a message that he did not recognise any right in Mr. O'Neill to the office.

The judge said that he would not then administer the oath to

Mr. O'Neill, or permit the filing of it in the clerk's office, because to do so might seem to prejudice the question of incumbency, and might perhaps have a tendency to make Mr. O'Neill the apparent incumbent of the office *in fact* whether he were such *of right* or not. The judge suggested that the oath could be as well taken before any other magistrate qualified to administer it, and that it might, with equal effect, be filed in the office of the law department, at Washington. It was accordingly filed there, having been taken before a commissioner.

The court was in session from 1st to 24th September. Mr. O'Neill was not in court; and the business of the United States in court was transacted by Mr. Gilpin, or by Mr. Valentine, who had been previously retained by the attorney-general to assist in the discharge of the duties of the office.

On Saturday, 19th September, Mr. Gilpin received from the attorney-general a written direction, dated on the 18th, to transfer the business of the office to Mr. O'Neill.

The only proceedings of Congress on the 21st September, consisted in an adjournment under a joint resolution that the President of the Senate and Speaker of the House of Representatives adjourn their respective Houses until noon on 16th October 1868, and that they then, *unless otherwise ordered by the two houses*, further adjourn their respective Houses until the 10th of November 1868, at noon, and then, unless otherwise ordered by the two Houses, further adjourn their respective Houses until the first Monday of December 1868, at noon.

A letter from the attorney-general, dated 22d September, recognised Mr. O'Neill as the attorney for the United States in this district, and renewed the direction to him to proceed in the discharge of the duties of the office.

On the 24th of September a clerk in the office of the district attorney handed to the clerk of the court a written order to issue process at the suit of the United States, subscribed with the name of Mr. Gilpin as the district attorney. The clerk of the court thereupon consulted the judge, who said that although he doubted Mr. O'Neill's right, he also doubted whether Mr. Gilpin was a rightful incumbent; and doubted whether, independently of any question *of right*, Mr. Gilpin could any longer be considered as the incumbent *in fact*.

The judge added that as there might be temporary public incon-

venience from uncertainty whether the government was regularly represented in its local court of ordinary criminal and fiscal jurisdiction, he would not refuse to hear, at the request of either Mr. Gilpin or Mr. O'Neill, with due notice to the other, an argument upon the right of either of them to a provisional recognition of him as the incumbent of the office. How far such provisional recognition of either might affect the legal question of incumbency *in fact*, the judge said that he did not know; but he said that certainly such a provisional recognition could not affect the question of incumbency *of right*. This question of right to the office, he said, could not be thus decided collaterally and informally.

In consequence of these suggestions of the judge, there was, at the instance of Mr. Gilpin's counsel, an argument on 30th September and 2d October, by

Mr. *Brightly* and Mr. *George D. Budd*, for Mr. Gilpin, and Mr. *Hirst*, for Mr. O'Neill.

Opinion by CADWALADER, District Judge, October 8th 1868.

The Act of Congress of 13th July 1866, prohibits the dismissal of any officer from the military or naval service in time of peace, except in pursuance or in commutation of the sentence of a court-martial. The Act of 2d March 1867, known as the Tenure of Office Act, applies to civil offices whose tenure is not constitutionally defined, and to which appointments cannot be made, when the Senate is in session, without the advice and consent of the Senate. In what follows, the general word offices will be understood as designating such offices. Their tenure is defined by the act in such a manner as to prevent the removal of their incumbents by the President without the Senate's concurrence, and also to prevent vacancies from occurring in a recess of the Senate, otherwise than by death or by resignation. To this intent the tenure is in general continued by the act until the Senate's concurrence in the President's appointment of successors. Of two exceptions of certain classes of officers from the general enactments, one which is at the close of the 1st section has of late been much considered. It does not concern any present question. The other exception is in the enactment of the 4th section that nothing contained in the act shall be construed to extend the term of any office the duration of which is limited by law.

A previous Act of Congress had limited the duration of the

term of the office in question to four years. Mr. Gilpin's term expired on 15th March last. The office then became vacant, if the words of the 4th section of the Tenure of Office Act are to be understood according to their unqualified literal import. If this literal construction would, in any great measure, frustrate the general purposes of the act, any other interpretation comporting with the words and the motives of legislation, and with the Constitution, would be preferable. But of the offices under the government at the date of the act, the greater number by far were held for an indefinite period.¹ The words of the 4th section may therefore be understood and applied according to their simple and literal import, without frustrating, in any material degree, the general purposes of the act.

If another meaning, not so simple but more consistent with any apparent general motives of legislation, might be attributable to the words, it could not be reconciled in every respect, nor for all the purposes of this case, with constitutional definitions of the powers of Congress. The general enactments of the 1st section expressly apply alike to offices held under appointments prior to the act, and to those held under subsequent appointments. As to the latter, there is no doubt of the power of Congress to prolong conditionally or provisionally the tenure of an office like that in question beyond the expiration of any certain term in it formerly limited by statute. The prolongation might have been absolute, and there is no reason that it may not be contingent, qualified, or conditional. In any such case the original appointment of the future incumbent is for the prolonged period. By *future* incumbent I mean of course one appointed after the enactment conditionally prolonging the tenure. But the present case of a person who at the time of the enactment was already in office for a limited term, is different. Congress can, it is true, abrogate offices established by legislation, and can *abridge* the term or tenure of an existing office like this. But the Constitution does not confer any power on Congress to extend an existing term in such an office in such a manner as to prolong absolutely or conditionally the tenure of a present incumbent. This cannot be done otherwise than by a renomination or new appointment by

¹ See the Tabular Analysis. Report of Impeachment of the President, I., 548-554.

the President, and concurrence of the Senate, as to the additional period.

If the constitutional power to do this by mere legislation did not exist, Mr. Gilpin's term or tenure cannot have been enlarged. I perceived from the first this difficulty in his case, but was not disposed to assume that any part of an enactment by Congress was unconstitutional without hearing an argument of the question. In arguing it his counsel have relied on the authority given by the Constitution to make all laws necessary and proper for carrying into execution the specified powers of Congress, and all other powers vested by the Constitution in the government, or in any of its departments or officers.

If the aid of this power of incidental legislation could be thus invoked without first establishing the existence of an appropriate principal power, indefinite usurpation of authority by the legislative organ of the government would be promoted. Congress has no power thus indirectly to determine who shall be the incumbent of an office. Consequently Mr. Gilpin could not, under any interpretation of the act, be in office.

The existence of this constitutional difficulty may assist in explaining the intent and purpose of the 4th section of the act. The difficulty did not indeed apply to future incumbents of offices whose terms are of limited duration. But without looking outside of the act itself, we can see that political motives may have induced its framers to consider principally the case of present incumbents; and that if their tenure could not be prolonged, the distinction as to future incumbents may have been disregarded as comparatively unimportant. The unqualified exception of all offices held or to be held for limited terms may thus become intelligible.

Therefore, whether the constitutional power of Congress, or the simple meaning of the act, is to be considered, Mr. Gilpin is not of right in office

Whatever may have been the state of the question of incumbency *in fact* until 19th September, when he received the attorney-general's letter of the previous day, the effect of this letter was to terminate the relations on which incumbency, independently of the question of *right*, depended. If this were otherwise doubtful, it would be necessary to consider essential peculiarities of the office which require the continuance of a relation of attor-

ney or counsel to client. If unquestionable right in such an office might carry with it a constructive incumbency in fact where no adverse occupation of the office existed, or if actual occupation of it continuing under the assertion of a questionable right could constitute incumbency in fact, it would not follow that there could, without right, be a *merely constructive incumbency in fact*.

The questions upon which Mr. O'Neill's right depends are,

1. Whether the President can, during a recess of the Senate, make a temporary appointment to fill a vacancy in office in a case in which the Senate has been in session either *when* or *since* the vacancy first occurred.

2. Whether there was a recess of the Senate upon the adjournment of Congress on 27th July last.

3. Whether the subsequent meeting of the Senate on 21st September, was such a session that their adjournment on the same day terminated a commission granted in the recess to expire at the end of their next session.

In the statement of the first question the phrase *temporary appointment* has been used. There is no such expression in the provision of the Constitution which confers on the President power to fill up vacancies that *may happen* during the recess of the Senate. This provision authorizes him to fill them by granting commissions which shall expire at the end of the Senate's next session. Such appointments have, nevertheless, ordinarily been designated as *temporary*. The expression is borrowed from the provision of the Constitution, that if vacancies in the Senate *happen*, by resignation or otherwise, during the recess of the legislature of a state, the executive of such state may make *temporary appointments* until the next meeting of her legislature which shall then fill such vacancies. Here the context of the phrase *next meeting* necessarily imports an extension of time in order that the vacancies may be duly filled. For this reason, and in order to harmonize the provision with that empowering the President to fill vacancies happening during the recess of the Senate, this phrase *next meeting* has been uniformly understood by the Senate, in determining the qualifications of its members, to be of equivalent import with *next session*, and to include the whole session.¹ There is thus a very close analogy between the

¹ The decision of General Smith's case, in 1809, to this effect, has been acted upon uniformly in a great number of cases.

two provisions of the Constitution; and the phrase *temporary appointment* may properly be understood as of like import in each.

The phrase *permanent appointment* has, by contrast, a meaning which cannot be misunderstood in its application to an appointment by the President, concurred in by the Senate.

The question will first be considered solely upon the effect of the provision of the Constitution as to the power of the President.

Those on the affirmative side contend that the provision must be understood as enabling him to grant a temporary commission whenever there may *happen to be* a vacancy during a recess of the Senate, whether the Senate was or was not in session when the vacancy occurred, or has or has not been since in session. The argument is that the words "may happen" upon whose effect the question depends, can be understood as meaning, not *happen to occur*, but *happen to exist*, and that this construction must be adopted because the opposite one would be less conformable to the reason, spirit and purpose of the Constitution, which, according to the argument, were only to prevent embarrassments of the government, and occasional dangers, from the existence of vacancies in office when the Senate might not be in session.

The public inconvenience or danger to public interests, from the continuance of a vacancy after a session of the Senate, is quite as great as from the occurrence of a vacancy during a recess. It is contended that the exigencies of the government required, therefore, a like remedy of the evil in each case; and examples have been adduced of cases in which it may be "nearly or quite impossible" for the President to send in a nomination before the adjournment of the Senate, or for the Senate to act upon his nominations though made in season for their action.

There are serious objections to so broad an extension of the presidential power in question. Such an extension of it, if established, would enable the President to do indirectly, what the Constitution does not allow him to do directly. His appointments during recesses of the Senate might be so made and renewed that they could not properly be called temporary. They might, moreover, be withdrawn from the consideration of the Senate. Thus he might, though the Senate were in session when the vacancy first occurred, or had sat since it thus occurred, appoint, in the recess, an officer who would be objectionable to the Senate if in

session,—and might, in disregard or defiance of the Senate, continue him in office indefinitely. This might be done by successive appointments and re-appointments of him at the commencement of every recess until the end of the next ensuing session of the Senate. There is nothing in the political experience of our country to warrant her security against such temporary appointments being thus made again and again with such results. The Senate, where vacancies existed, would thus be unable to oppose any effectual check to the President's power of appointment. To avoid the danger of impeachment of a President, the appearance of defiance of the Senate might be avoided by not making nominations during the session, or abstaining in the recess from the re-appointment of rejected persons, but substituting other appointees, who, if the Senate were sitting, would be not less objectionable. This would be no visionary danger where the President and a majority of the Senate are of different political opinions.

If it had been intended to give such an amplitude of power to the President, his authority to fill vacancies in office would not have been limited to those *happening during* a recess, nor limited to grants of commissions to expire at the end of the Senate's next session. He would have been expressly authorized, in every case of a vacancy existing during a recess, to grant commissions to continue until a new appointment by him with the advice and consent of the Senate.

The general question has from time to time arisen, as will be seen hereafter, in different specific forms. In some of these forms of it, the words of the Constitution might, without straining them, be accommodated to either an affirmative or a negative answer. But, in other forms of it, those persons who, in argument, support the affirmative, must, in candor, admit that their construction is not conformable to either the literal or the ordinary import of the words "*may happen.*" If the purpose of the Constitution had been demonstrable to confer, as the argument assumes, an unqualified executive power to prevent at all times the continuance of any vacancies during recesses of the Senate, the latitude of construction contended for might be less objectionable, though there is always great political danger from enlarged constructions of the Constitution upon such reasons. The danger from them may be unseen until too late to avoid it. But was the purpose of the constitutional provision thus unlimited?

According to Judge STORY (Constit. § 1551), the purpose was, "that the President should be authorized to make temporary appointments during the recess, which should expire when the Senate should have had an *opportunity to act* on the subject." According to the construction contended for, it is, on the contrary, unimportant whether the Senate has had such an *opportunity to act* or not. The purpose attributed by Judge STORY is thus disregarded in the argument on the affirmative side of the question.

Before the adoption of the Constitution, opinions differed, as they now may differ in the abstract, whether the President's power of making appointments to office, ought to be unchecked. In the opinion of some persons, he should have had the whole power without restraint or qualification. Others were appalled with various reasonable apprehensions of enormous and frightful dangers from uncontrolled power of appointment in a single magistrate. The reasons urged on the latter side prevailed. The Constitution has, accordingly, opposed in the Senate a barrier against uncontrolled executive power of the President in this respect. The constitutional policy having been established, it must be carried into effect without the influence of any abstract prejudice in favor of the opposite political theory.

Fundamental opposing reasons of constitutional policy outweigh the argument which has been urged in favor of adopting the latitudinarian construction. The occasional evils which might be avoided through such a construction are more or less inseparable from any system of government of a free people. Under a complicated political system of mutually counteracting checks, like the government of the United States, the continuance of our freedom could not be maintained without incessant caution to guard against both executive and legislative encroachments. Either of them tends towards usurpations of despotic power, and the tendency may be so gradual as to be almost imperceptible. The dangers from such encroachments would be more serious than from the occasional suspension or inefficiency of governmental functions through temporary vacancies in office.

More serious evils may occur through inaction of the legislative department of the government. A partial failure of the necessary annual appropriations by Congress has occurred more than once; and, but for the call of an extra session, had once occurred on a large scale. Such a failure to legislate might sus-

pend the functions of the government. This, if it occurred, would not justify the executive in a violation of the constitutional provision that no money shall be paid out of the treasury without a legislative appropriation. Every extension of executive powers under any such emergency would, as I have said, be a step towards despotism; or, as may be added, might establish it at once. All evils to be apprehended from administrative inefficiency, are minor as compared with inevitable or probable consequences of the extension of legislative or executive power beyond the strict warrant of the Constitution.

It has been truly said that the dangers from extension of executive, may be less than are to be apprehended from that of legislative, power, because the President may, but Congress cannot, be impeached for wilful abuse of constitutional power, though its limits be not exceeded. But the suggestion, however true, affords no sufficient answer to the objection against latitude in construing constitutional grants of executive power. If the general form of the present question were different, if the literal import of the Constitution were in favor of the extended power, the argument might indeed be a fair one against *excluding* a construction which would conform to the import. We have seen already that if the existence of the power in question were admitted, it might be exercised most injuriously without any liability to impeachment. But the suggestion of the liability to impeachment may be disposed of on more general grounds. If such a suggestion were an answer to the objection against a constructive extension of the meaning of the Constitution beyond the ordinary import of its words, the constitutional barriers against undue expansions of executive power would soon be burst asunder.

The Constitution requires the President to *take care that the laws be faithfully executed*. It has been truly said that his duty therefore is to fill vacancies in office *wherever the Constitution confers on him the power to do so*. This cannot imply that where the Constitution does not expressly authorize him to fill vacancies, they can be temporarily filled by him under the provision of the Constitution which requires him to take care that the laws be faithfully executed. There is no executive power conferred by the Constitution which it would be more dangerous to enlarge through a loose construction upon suggested reasons of expe-

diency, or of relative necessity. But this provision of the Constitution has, if I am not mistaken, been sometimes invoked to aid the constructive enlargement of the provision authorizing him to fill vacancies that may happen during a recess of the Senate. This cannot be a right view of the question. In some cases in which offices are vacant, the existence of the vacancies may render it impossible for the President to see to the execution of the laws. In such cases the laws cannot be executed while the vacancies continue. In other cases there may be no such impossibility, or the temporary impossibility may not be a total one. In the latter cases, he may temporarily see, as far as possible, to the execution of the laws. But he does not thereby temporarily fill the vacant offices. They continue vacant, though functions corresponding more or less to their duties may thus be executed.

This difference between filling a vacancy in office, and seeing that the vacancy occasions no failure in the execution of the laws, might be well exemplified in the present case of the office of attorney of the United States for a judicial district. If the office is vacant the greater part of its business, if not the whole of it, may nevertheless be transacted. The gentleman whom the attorney-general has employed under the Act of 1861, as an attorney and counsellor, may represent the United States in their suits and prosecutions, and may otherwise discharge the duties, in the performance of which he would have assisted the district attorney if no vacancy had occurred. Should the existence of a temporary vacancy in the principal office be established, the circuit judge may, under an Act of 3d March 1863, temporarily fill the vacancy. His appointee will, under the Constitution, be an officer of the court. If neither of these Acts of 1861 and 1863 had been passed, the President might, through the attorney-general, as the head of the law department of the government, have retained an attorney or counsellor, not so permanently as the Act of 1861 authorizes, but for the occasional purposes of the exigency. Such a lawyer's temporary representation of the United States in the legal business of the district would essentially differ from the temporary incumbency of an office. He would not be an officer of the United States.

For the reasons which have been stated, my opinion upon the first question, if considered as an open one, would be that the President cannot make the temporary appointment in a recess,

if the Senate was in session when, or since, the vacancy first occurred, and consequently that Mr. O'Neill is no more in office of right, than he would have been if commissioned by the President during a session of the Senate without their advice and consent.

It is said, however, that the question is not open. I believe that it has never been judicially considered. But it is said that the existence of the power in question has been established by an administrative usage of forty-five years, during which appointments made in exercise of the power by successive Presidents have been acquiesced in by the Senate, and that this executive usage has, in this period, been founded on, or supported by, unvarying opinions of successive attorney-generals.

Where an executive usage has been of long continuance, with constantly recurring opportunities for judicial contestation, and the parties who might have contested have never complained, judicial tribunals may consider a truly doubtful question as to the constitutionality of the usage less open to forensic dispute than it would otherwise have been. The effect thus attributable to such a usage, may, in the absence of judicial contestation, be greater if legislative acquiescence has been evinced or may be implied.

Any remaining doubt may be removed, or lessened, if uniformly concurring opinions of experienced statesmen, and of learned lawyers, in accordance with such a political usage, can be traced from an early period, more especially where such period was contemporaneous, or almost so, with the adoption of the Constitution. Where all such conditions have been apparently fulfilled, a conclusion should not, however, be judicially reached upon such grounds alone, without caution.

Have all or any and which of these conditions been fulfilled? In the outset of this inquiry it may be repeated that if the presidential power in question had been assumed and exercised with effect, where sufficient opportunities for judicial contestation were afforded, and no person had ever availed himself of any such opportunity, the inference of general acquiescence in the constitutionality of the asserted power might have been to some extent warranted. But there never was any such opportunity of contestation.

Indirect contestation was impossible (see 17 Howard 284),

and the President's power of removal would have precluded any direct contestation, if it had otherwise been practicable when the attorney-general was not a contestant. Until the Acts of 1866 and 1867, which have been mentioned, the power of Congress to define tenures of office in such a manner as to prevent removals at the mere will of the President had scarcely ever been exercised, though the legislative power to do so as to all offices whose tenure is not constitutionally defined was never doubtful.

The recently-created office of comptroller of the currency was, I believe, the only one of which, at the dates of those acts, the incumbent was not removable by the President without any concurrence of the Senate, and without any statement of reasons.¹ The President's general power of arbitrary removal where the tenure had not been otherwise defined by the Constitution or by Act of Congress, was beyond question established. (See 13 Peters 259.) Of this power the former existence and validity are not impliedly questioned by the Acts of 1866 and 1867.

The omission to litigate the question before the Act of 1867, therefore, warrants no just inference of acquiescence in the alleged administrative usage. Even under this act judicial contestation may not readily occur.

In approaching the inquiry whether, and how far, any of the other conditions have been fulfilled, it may be remarked that from the distinguished eminence of some of the attorney-generals whose opinions will be mentioned, judicial deference might almost be due to their expositions of constitutional law, even where prac-

¹ The Acts of 1863 and 1864 made the comptroller of the currency appointable by the President on the nomination of the secretary of the treasury, and by and with the advice and consent of the Senate. The comptroller thus appointed was, according to the Act of 1863, to hold the office for a certain term, unless sooner removed by the President by and with the advice and consent of the Senate, and according to the Act of 1864, to hold for such term unless sooner removed by the President upon reasons to be communicated by him to the Senate. Two prior acts, no longer in force, one of them passed in 1789, organizing the government of the Northwestern Territory, and the other passed in 1836, organizing the government of that part of this territory which afterwards became the state of Wisconsin, were intended to execute the provision of the Ordinance of 1787, that the tenure of judicial offices in the territory should be during good behavior. In the opinion of many persons, there was an honorary obligation of the constitutional government of the United States thus to execute this provision of the ordinance of the previous confederation. The judicial tenure in other territories of the United States has not been during good behavior.

tical concurrence in them has not extended beyond the limits of executive administration. This may certainly be said of Mr. Taney, afterwards the venerated Chief Justice of the Supreme Court of the United States, and of Mr. Cushing, previously a judge of the Supreme Court of Massachusetts, whose opinions, while he was attorney-general, are, through the combination of doctrinal with practical instruction which distinguishes them, more useful perhaps than the writings of any publicist since Bynkershoek. Of course, I do not mean to intimate that through deference to any such extra-judicial opinions, I should surrender the judgment which it is my duty to exercise. But my judgment cannot be uninfluenced by the deference most justly due to them. Except in one respect, however, opinions of attorney-generals are, in themselves, of no more weight than those of as many private lawyers of equal abilities and acquirements.

The exception, which may be an important one, is that the official opinions of attorney-generals may, for a long time, have been so uniformly acted upon by executive and legislative organs of the National Government as to have become the unquestioned foundation of a system of legislation, or of administration. Such legislative and executive usages, when uniformly acquiesced in, especially where they have been open to judicial contestation, are, as I have already said, in themselves, more or less authoritative expositions of the true meaning and effect of the Constitution. The opinion of a former law officer of the government, when it has been the foundation of such expositions, may be an important part of their legal history, and may therefore be cited in explanation of them, or even as having in itself, for this reason, a certain weight, perhaps, of authority. But the number of concurring official opinions of attorney-generals on the same point adds very little to their weight, because, in the absence of judicial decision, these law officers of the government sometimes attribute to the opinion of an official predecessor an effect not much unlike that of an authoritative precedent. In one respect, indeed, the number of such official opinions may even detract from their weight, because, if the same question has been repeatedly stated anew, and renewals of the former opinions of attorney-generals upon it have been obtained from their successors, this may indicate that no settled administrative usage had been understood to be established under the former opinions.

In this connection I will state and explain what induced me to refer counsel, in the course of their arguments, to the opinions of commentators on the Constitution who were either ignorant of these official opinions of the attorney-generals, or entertained opinions of a seeming opposite tendency. My purpose was to show that there had not been such a distinct prevalence of uniform opinions on the question as the counsel on one side had assumed. In his argument he had, as I thought, attributed an inherent force of authority to the official opinions which they did not possess. My reference to the commentators was intended merely as a suggestion that their opinions might be weighed in the opposing scale of his own balance. Among them was Judge Story, whose Commentaries have been cited occasionally, even by the Supreme Court, as elucidating questions of constitutional law, and Mr. Sergeant, afterwards a judge of the Supreme Court of Pennsylvania, who was often followed by Judge Story, and was not less learned and wise than cautious and accurate. Such references, whether to commentators, however eminent, or to attorney-generals however distinguished, are outside of the ordinary proper line of argument in a judicial tribunal. But they are, when due caution is observed, not absolutely improper in excepted cases; and the present case, I think, is one.

The question arose in 1823. in the same form in which it is presented in this case. The official term of a navy agent at New York expired when the Senate was in session. During the same session another person was nominated by the President; but this appointment was not concurred in by the Senate. The vacancy continuing to exist in the recess of the Senate, Mr. Wirt, then Attorney-General, was of opinion that the President could fill the vacancy by a temporary appointment. Mr. Wirt thought that the phrase of the Constitution "happen during the recess" might be understood as meaning *happen to exist in a recess*, whether the Senate had or had not been in session when or since the vacancy first occurred. He supported this opinion upon reasons of convenience to prevent vacancies in office; and upon these reasons considered his interpretation the most accordant with the spirit and purpose of the Constitution, though the opposite interpretation would, as he conceived, be the most accordant with the literal sense and natural import of the words.

In the form of the question in which it was next presented to

an attorney-general, the possible dangerous political consequences of an affirmative answer were, in part, discernible. This was in 1832. A vacancy had occurred in a recess of the Senate, by the expiration of the term of office of a register of the land office. During the same recess, a temporary appointment in his place had been made by a commission which was in force until the end of the next session of the Senate. During this next session, the person thus appointed had been nominated by the President for the permanent appointment, and had been rejected by the Senate. During the same session the same person had been nominated again. The latter nomination had been laid by the Senate on its table. The Senate had adjourned without having further acted upon the case. The opinion of the Attorney-General, Mr. Taney, was asked by the President upon the question whether, during the recess of the Senate, he could appoint the same person, or any one else, to the office. Mr. Taney was of opinion that the President could.

In accommodating this opinion to the letter of the Constitution, there was less difficulty than in either of the two cases of the navy agents. The commission granted in the recess did not expire until the end of the next session, during which, no appointment was concurred in by the Senate. The incumbency had thus continued until the commencement of the recess. As there had not been any vacancy during the session, the new vacancy might, even according to an almost literal import of the Constitution, be understood as *occurring*, if not *happening* in the recess. But the difficulty in the way of accommodating such a construction to the spirit and purpose of the Constitution was much greater than in the case which had been considered by Mr. Wirt. This difficulty I have explained. How the objection was overcome, without unduly slighting it, is not easily perceivable. The answer that the President might be impeached was the only one suggested. This answer is insufficient for the reasons which have been stated.

The extent of the executive power to fill vacancies which these two opinions asserted does not appear to have been afterwards conceded. The previous tendency of Mr. Sergeant's views in an opposite direction will be mentioned hereafter. It may be remarked here that he published a revised edition of his treatise on constitutional law in 1830, seven years after the opinion of Mr. Wirt, without any adoption of Mr. Wirt's views, and with-

out any material alteration of his own former text on this point. Judge STORY, in his Commentaries, published in 1833, a year after Mr. Taney's opinion, did not cite it, nor that of Mr. Wirt, nor express any such opinion; but on the contrary followed closely the text of Mr. Sergeant. In the editions of Chancellor KENT's Commentaries prior to 1841, when the opinions of the attorney-generals first appeared in print, he quoted the provision of the Constitution authorizing the President to fill vacancies happening during the recess of the Senate, but did not mention the point now in question in any form of the proposition. In subsequent editions the text is unchanged; but in a note he refers to Mr. Wirt's opinion without mentioning that of Mr. Taney, who was already Chief Justice. The opinion of Mr. Wirt was quoted by Chancellor KENT, but with a reserve which by no means indicates his adoption of it.

In 1841 the question was referred anew to the attorney-general, Mr. Legare, in the broad general form of a proposition whether the clause of the Constitution authorizing the President to fill up all vacancies that may happen during the recess of the Senate, authorizes him to fill a vacancy so occurring after a session of the Senate shall have intervened. The attorney-general objected to considering the question in so abstract a form; and restated the proposition so as to make it applicable in the case of a vacancy which had occurred during a recess, and had been filled by a temporary appointment, after which, the President, during a session of the Senate, had made another nomination which was not acted upon by the Senate; and so, the office being vacant in the ensuing recess, the restated question was whether the President had power to fill it again by granting a commission which should expire at the end of the next session of the Senate. In this form of the question the attorney-general answered it affirmatively with reference to the words of the Constitution, and to considerations of necessity or expediency. It has already been suggested that in such a special form of the question, the answer thus given could be accommodated to the words of the Constitution.

That these official opinions were not followed without scruple or hesitation appears from the constant recurrence of the question submitted, as it was, in different forms, to successive attorney-

generals, Mr. Mason in 1846, Mr. Cushing in 1855,¹ and afterwards to others who concurred in the views of their predecessors. In October 1862, however, Attorney-General Bates was consulted by the President as to "his power to fill a vacancy on the bench of the Supreme Court, then existing in the recess of the Senate, which vacancy existed during and before the session of the Senate." Mr. Bates, in his letter of reply, says: "*If the question were new*, and now for the first time to be considered, *I might have serious doubts of your constitutional power to fill the vacancy by temporary appointment in the recess of the Senate.* But the question is not new. It is settled in favor of the power to fill up the vacancy as far at least as a constitutional question can be settled by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, so far as I know or believe, by the unbroken acquiescence of the Senate. Referring to the practice and to these authorities," he gave his opinion that the power was exercisable. Conformably to these views, Judge Davis was temporarily commissioned on 17th October 1862, during the recess of the Senate.² I believe that he did not take a seat upon the bench of the Supreme Court under this commission. The next session of that court began on 1st December 1862. His permanent appointment was, I believe, sent into the Senate on 3d December, and confirmed by the Senate on or before 8th December 1862, on which day his permanent commission bears date. He took his seat, as I am informed, on 10th December 1862.

In considering the effect of the opinions of the official predecessors of Mr. Bates,³ it becomes important to correct the statement, in his opinion, that the exercise of the asserted presidential

¹ The question was not directly involved in the subject of Mr. Cushing's opinion; but was considered by him incidentally in the course of an inquiry mentioned hereafter as to the President's power to appoint ambassadors and other diplomatic ministers.

² In the argument at the bar, it was erroneously supposed that Judge MILLER, of the Supreme Court, had in like manner been commissioned by the President during a recess, and Judge FIELD in a manner somewhat similar. Judge MILLER was, however, commissioned on 16th July 1862, when Congress was in session, and Judge FIELD on 10th March 1863, during an extra session of the Senate. Each appointment was of course with the advice and consent of the Senate.

³ For a reason, which will appear when we come hereafter to consider an Act of Congress of 9th February 1863, it is not necessary to mention any opinions of attorney-generals subsequent to that of Mr. Bates.

power had been "sanctioned by the unbroken acquiescence of the Senate." The statement was founded on a mistake. The supposed foundation was in the fact, of which the truth may be here assumed, that in all the cases of permanent reappointment of temporary appointees which had occurred since 1823, the Senate, in acting upon the permanent appointments, had not rejected any one merely because his temporary appointment had been made after a session in or before which the vacancy had first occurred; nor had in anywise discriminated unfavorably to any such appointee for such a reason. It is to be observed that in such a case the Senate acts upon the permanent appointment only, and not upon the previous temporary appointment. This temporary appointment cannot possibly be submitted to them for their advice and consent. The mistake was in overlooking this impossibility, and supposing that the Senate's approval of such a person's permanent appointment was a *confirmation* of his former temporary one. The Senate's concurrence in any appointment by the President is properly called a *confirmation* of it, whether the appointee had received a previous temporary appointment or not. But when the same person who was temporarily appointed in a recess of the Senate is permanently appointed, at the next session the permanent appointment only can be *confirmed*. The word confirmation is misapplied when the Senate's concurrence in this appointment is called a *confirmation* of the former temporary one. The temporary appointment indeed merges in the permanent one when the latter is confirmed and accepted. But this neither makes the permanent appointment itself, nor makes the confirmation of it, a confirmation of the temporary one. If the Senate rejects the appointee, or does not act upon his nomination for the permanent appointment, he nevertheless continues until the end of the session, to be in office under the former temporary appointment if it was a valid one.

The mistake originated I believe in official or semi-official language of persons employed in executive departments of the government, and from thence found its way into popular phraseology, and to some extent into that of legislation. Thus an Act of Congress of 1st May 1810, prohibiting the payment of compensation to any chargé des affaires or secretary of legation, unless appointed by the President by and with the advice and consent of the Senate, authorized him in the recess of the Senate

to make appointments to such offices *which appointments should be submitted to the Senate at their next session thereafter for their advice and consent*. If diplomatic offices only had been the subjects of such legislation, it might have been explained for special reasons of peculiar applicability which will be mentioned hereafter. But there have been other subjects. The army appropriation bill of February 1863 prohibits the payment of any money as salary to any person appointed during a recess of the Senate to fill a vacancy in any existing office which vacancy existed when the Senate was in session, and is by law required to be filled by and with the advice and consent of the Senate until such appointee shall have been *confirmed* by the Senate. And an Act of 3d March 1863 authorized the appointment of officers of the military signal corps; and, in order to allow time for a thorough examination of them, enabled the President to appoint them during the recess, requiring, in like manner, that *the appointments should be submitted to the Senate at their next meeting for their advice and consent*. The advice and consent of the Senate was in these acts treated as a *confirmation* of the previous temporary appointment. Notwithstanding this mistake, the acts of course took effect as intended, according to the popular but legally incorrect meaning of the words. Such a use of them by Congress was not the less a mistake. The like mistake was not always made in congressional enactments. The Act of 2d March 1799, regulating the collection of duties on imports, sec. 17, and the Act of 22d July 1813, for the assessment and collection of direct taxes and internal duties, sec. 2, each of which established collection districts or authorized their establishment, and provided for the appointment of collectors in every district, empowered the President, in case the appointment of the several collectors for the respective new districts should not be made during the existing session of Congress, to make them during the recess of the Senate by granting commissions which should expire *at the end of their next session*.¹

There have, I believe, been other Acts of Congress in which, as in the two latter enactments, the mistake was avoided. But it was not avoided in official parlance; and this may explain its occurrence in the opinion of Attorney-General Bates. If he had

¹ Commissions under the Act of 1813 appear to have been granted by the President until the end of the next session of the Senate, and *no longer*.

not made the mistake, his own doubts probably would not have been so readily resolved.

The mistake was corrected by the Supreme Court in 1824, in a case in which the court below had decided that, in point of law, both commissions of an appointee, the latter permanent, the former temporary, "constituted but *one continuing appointment*, the second commission operating only as a confirmation of the first;" and Mr. Wirt, then attorney-general, said in argument, in the Supreme Court, as to the two commissions, that "*the practice of the government* had been to consider them as *one continuing commission*." In the opinion of the Supreme Court "the decision of the court below was founded in mistake." The Supreme Court said that the two commissions could "not be considered as one continuing appointment without manifest repugnancy," that they were "not only different in date, and given under different authorities and sureties, but were of different natures" and *durations*. It was decided accordingly that the responsibility of a surety in the official bond of a temporary appointee terminated on his acceptance of the commission under his permanent appointment after it had been confirmed: 9 Wheaton 634, 735.

This judicial correction of the mistake is important. The mistake should be viewed in the same light with reference to the political, practical, and moral, as with reference to the legal aspect of the question. The Senate could not, even before the decision of the Supreme Court, much less could they afterwards, without mere causeless vindictiveness, discriminate in the matter in question by rejecting persons who had been temporarily appointed to fill vacancies which had existed when the Senate was in session. The question of constitutional power was doubtful, or had been so considered. The temporary appointees were therefore morally blameless. After the decision of the Supreme Court, acquiescence in the President's assumption of the power in question could not be reasonably implied from the confirmation of an appointment which, according to the decision, was a new and different one, and was neither a continuation, nor a confirmation, of the questionable one. Thus rejection for this reason alone would have been wanton, arbitrary, and unjust, and, as excluding the inference of acquiescence, would have been useless.

The supposition of acquiescence by the Senate from their not having rejected the permanent appointees appears therefore to have been founded in a political as well as a legal mistake.

That it was such a mistake will appear more clearly when the views in which the Senate has regarded the question are elucidated from positive sources. We may consider, first, decisions by the Senate as to the qualifications of its members, and afterwards, proceedings of the Senate as a co-ordinate branch of the executive government.

The cases of Mr. Johns, in 1794, and of Mr. Phelps and Mr. Williams in 1854, depended upon the effect of the above-mentioned provision of the Constitution as to the power of the executive of a state to fill vacancies in the Senate, happening during the recess of the legislature. The Senate, in these cases, decided that when a vacancy thus occurred in a recess, the governor could not fill it during a subsequent recess, the legislature having sat in the interval,—that where he had properly filled a vacancy during the recess in which it occurred, the seat, unless filled by the legislature of the state, became vacant at the end of their next session,—and that although the vacancy afterwards continued, it could not be filled by the governor of the state.

The vote excluding Mr. Johns from a seat was twenty to seven, when a full Senate was composed of only thirty members. In the case of Mr. Phelps the whole subject was thoroughly considered and the vote was twenty-six to twelve. The case of Mr. Williams was decided without a division. It was urged in these cases with great earnestness, but in vain, that according to the reason, spirit, and purpose of the Constitution, a state should not be unrepresented in the Senate, that the evil resulting from a vacancy did not depend upon its cause, and that the provision of the Constitution must have been intended to prevent vacancies by enabling the governor of a state to fill them temporarily so long as the legislature might be unable, or might fail, to do so. Such arguments closely resemble those which have been urged upon the present question.

It would seem incongruous that the word *happen* upon whose application the question depends should not have a similar import in the two provisions of the Constitution.

We find, accordingly, that a broader meaning has not been attributed by the Senate, as a co-ordinate branch of the executive,

to the provision of the Constitution which confers on the President power to fill vacancies in office that may happen during a recess. The question was first considered by the Senate, acting in its latter capacity, with reference to the case of an office newly created by Congress, and not filled before their adjournment. If the words of the Constitution, "*vacancies that may happen* during the recess of the Senate," instead of being referred to the first occurrence only of a vacancy, are to be understood as referable to any existence, or continuance of a vacancy, the Constitution gives to the President power, during the recess, to fill temporarily such newly-created offices. But if the provision of the Constitution applies only to a recess in which the vacancy first occurs, he cannot thus fill them. There is, therefore, in principle, no difference between this form of the question and those other specific forms in which we have already considered it. Acts of Congress purporting to enable the President to fill such newly-created offices during the recess, by temporary appointments, have already been mentioned. Such enactments have an independent effect, as legislative expositions, which will be considered hereafter, under a distinct head. In the mean time, it may be remarked here that the effect attributable to them has been considered by the Senate, in its executive capacity, incidentally to inquiries how far the President may have an occasional power to appoint, without the Senate's concurrence, commissioners to negotiate a treaty with a foreign state. An apparent digression will be necessary in order to explain how this inquiry arose.

Congress may, through the power to regulate the compensation of diplomatic functionaries, and in some other modes, exercise indirectly more or less control over the intercourse of the government of the United States with foreign governments. But the President and Senate, if the question of compensation could be excluded, would under the Constitution have, in their executive capacity, almost unlimited control over such intercourse. The subject has been fully examined by Attorney-General Cushing, in a very lucid and instructive opinion of 25th May 1855, upon the effect of the act of that year remodelling the diplomatic system of the government. In this opinion, in which, in most respects, I concur, the prior legislation, and prior executive usages, are historically investigated. The question, as between

the President and the Senate, of his power to negotiate primarily, without their participation, a treaty, though it cannot afterwards become binding until ratified by them, is a distinct proposition which, within certain limits, involves no difficulty. The question may, within, or beyond such limits, involve an inquiry as to his independent power to select and send the negotiator. An ambassador,¹ or other public minister, whether designated as a commissioner, or by any other official title, cannot, except for purposes of mere occasional exigency, be constitutionally sent abroad otherwise than under such an appointment as that of any other officer of the government. But the President primarily represents the United States in the intercourse of their foreign relations, including the negotiation of treaties. He is by the Constitution expressly authorized to *receive* ambassadors; and it has been supposed that a power inherent in his office may enable him to send special diplomatic representatives abroad whenever it may be necessary to do so for occasional public exigencies, whether the Senate is in session or not. That even the occasional exercise of such an inherent or incidental power was jealously watched appears from the Act of 1st May 1810, which has been cited. The question of the existence of such a power, and the present question, are different, arising as they do, in part, under different provisions of the Constitution. But with reference to the legislation as to newly-created offices, the present question was incidentally considered when an occasional diplomatic appointment was made in a recess of the Senate. Our present inquiry is not whether the Senate's views of the question as to an occasional diplomatic mission were right or wrong. That is here unimportant. The inquiry to be elucidated is whether the Senate, in considering that question, admitted or denied the power of the President which is now in question. Upon this point Mr. Sergeant and Judge STORY have referred to certain proceedings of the Senate.

In the year 1813, President Madison, during a recess of the Senate, appointed commissioners to negotiate the treaty of peace afterwards concluded with Great Britain. Mr. Sergeant, after stating that the principle acted upon in this case was not acquiesced in, but was protested against at the succeeding session of

¹ In the general sense in which the word is used in the Constitution.

the Senate, says that, afterwards, in 1822, "during the pendency of the bill for an appropriation to defray the expenses of missions to the South American States, it seemed distinctly understood to be the sense of the Senate, that it is only in offices that become vacant during the recess that the President is authorized to exercise the right of appointing to office, and that in original vacancies, where there has not been an incumbent of the office, such a power does not attach to the executive." He also quotes the coincident report of a committee of the Senate made a few days later, in which it was declared that in the provision of the Constitution as to vacancies that may happen during the recess of the Senate, "the word *happen* has reference to some casualty not provided for by law," and that "if the Senate be in session when offices are created by law, which were not before filled, and nominations be not then made to them by the President, the President cannot appoint after the adjournment of the Senate, because in such case *the vacancy does not happen* during the recess." It was added that in many instances, where offices were created by law, *special power was given to the President to fill them in the recess of the Senate*, and that, in no instance, had the President filled such vacancies without special authority of law.

Mr. Sergeant and Judge STORY quote these proceedings of the Senate, and subsequent remarks of the committee of the Senate, in such a manner as to imply that their own opinions coincided.

The proceedings of the Senate were in the year next before that of Mr. Wirt's opinion. We have seen that in 1824, the year next after his opinion, the decision of the Supreme Court that the Senate's confirmation of a permanent appointment was not a continuance of a previous temporary commission of the appointee, removed any reason which there might previously have been for formal or informal protests by the Senate in such of the cases of previous temporary appointment as might involve the present question.

In 1825, a case occurred which, I think, shows that upon this question, in its general form, there was a contrariety of opinion between the President and the Senate.

This was the case of Amos Binney, whose commission as navy agent at Boston expired on 15th February 1825, during the session of Congress. Three days after, he was nominated to the

Senate for the same office. The session closed on 3d March 1825, the Senate adjourning without having acted on the nomination. The Senate was convened for, and was in session on, the next day, 4th March 1825. On the 7th of the same month Mr. Binney was renominated by the President. Two days later, the Senate adjourned, *having first postponed this nomination till the commencement of their next regular session*, on the first Monday of December. During the recess, on 22d March, 1825, Mr. Binney was temporarily appointed to the office by President John Quincy Adams, in opposition, as it would seem, to the opinion of the Senate.

The postponement of the nomination by the Senate, however it may have exceeded their legitimate power, indicated their dissent from Mr. Wirt's then recent opinion. If they supposed that the President would have the power to make the temporary appointment after their session, it does not seem at all probable that they would have passed the resolution to postpone.

Legislative expositions by Congress will next be considered, not as decisive, in themselves, of any question, but as indicating concurrence or contrariety of opinion as to the existence of the power in question. Acts of 2d March 1799, 1st May 1810, 22d July 1813, 9th February 1863, and 3d March 1863, have already been mentioned. How many more such enactments might be found upon searching the statute book, I do not know. They may be numerous. Those which have been cited are sufficient, as examples. It should be recollected that they did not all apply to newly created offices. The Act of 9th February 1863, on the contrary, applies to the question in its general form.

These acts import a discrimination between cases in which the President has, and those in which he has not, the constitutional power to make temporary appointments, the difference being between the Senate's having, or not having, been in session when, or since, the vacancy first occurred,—the very difference which the argument on the affirmative side of the present question supposes to have been constantly disregarded. If the acts of 1st May 1810, and 9th February 1863, were the only legislation to be considered, there might perhaps be dispute whether they should be understood as affirming the power of the President, and only checking its undue exercise, or as implying denial or doubt of the existence of such a power. To the Act of 1810, the former

motive might, upon reasons already explained as applicable peculiarly to diplomatic appointments, be imputed less objectionably than to the Act of 1863. But such a construction even of the former act, and much more of the latter one, would impute motives of legislation which perhaps are not properly attributable to Congress, because, if the President had the constitutional power, Congress had not the power directly to prevent its exercise, and, in that case, perhaps ought not to have done so indirectly. Upon the other acts there can be no such dispute. In them, the question whether Congress could vest the power in the President if it had not been conferred on him by the Constitution, may indeed have been overlooked. But, however this may have been, it is quite certain, that the question of the existence of the President's power was legislatively considered. The express grant of power by these enactments implies that, in the opinion of Congress, the Constitution had not given the power to him, or, to say the least, indicates the *constant doubt of Congress* on the subject. The counsel has, in argument, cited copiously the debate in the Senate on the passage of the enactment of 9th February 1863. The purposes for which such citations in a judicial tribunal are admissible must be very limited. One of them, under certain cautions, may, however, be to show on what points, and how, at the date of a statute, opinions differed as to what was the previous law. This debate shows that, upon the point of constitutional law now in question, two Senators, each of whom had been a judge of the Supreme Court of his own state, differed in opinion whether the President had the power under the Constitution.

The question cannot have been overlooked by those who framed the Tenure of Office Act of 1867. They knew that constitutional doubts could not be resolved by legislation, and that if the presidential power in question existed under the Constitution, legislation could not abridge it, otherwise than by so defining the tenure of offices as to diminish the frequency of occasions for its exercise. Aware of this, they seem to have discriminated between different specific forms of the general question, and to have intended to legislate for those cases only in which there would have been least difficulty in reconciling the President's assumption of the power with the literal import of the Constitution. We have seen that the difficulty in this respect was greatest in cases like the present one of Mr. O'Neill, where the Senate was

in session when the vacancy first occurred. There is, accordingly, no provision for such cases in the act. In cases in which vacancies first occur during a recess, the presidential power is, during the same recess, unquestionable. But in such cases, according to the argument on the affirmative side of the present question, the temporary appointments of the same or other persons to fill the same vacancies, might be constitutionally repeated in recurring recesses. We have seen that such repeated temporary appointments, if they had not been repugnant to the spirit of the Constitution, might perhaps, without much difficulty, have been accommodated to its letter. The 8d section of the act seems to have therefore been a legislative endeavor so to define the tenure as to prevent such repeated appointments, whether they would, if the tenure had not been so defined, have been constitutional or not. The section was, in short, a legislative effort to prevent the question, in this form of it, from arising. The first sentence of the section is a transcript of the constitutional provision with an insertion of the words *by reason of death or resignation*, and an addition of the word *thereafter* at the close. The purpose of introducing the words "by reason of death or resignation" has already been explained. It was to prevent as much as possible the occurrence, during recesses of the Senate, of any vacancies otherwise than by death or by resignation. The word *thereafter* was added in order to prevent the repetition of the temporary appointments to fill such vacancies. We are not at liberty to understand the word as a mere pleonasm. Congress, in making the addition to the words of the Constitution, cannot have intended to deal so lightly with its language. If this word *thereafter* is to be referred grammatically to the nearest antecedent, which is *death or resignation*, the apparent intent of Congress to restrain the exercise of presidential power without the Senate's concurrence, to the narrowest limit possible, is fulfilled. If the word *thereafter* is to be referred, not to this grammatical antecedent, but to *recess of the Senate*, the result must be the same, because, to effectuate the same apparent legislative intent, such recess must here be understood as the recess in which the vacancy first occurred.

Now the third section is inapplicable to vacancies which first occur when the Senate is in session, whether they occur through death, or through resignation, or otherwise. This being so, it

must be recollected that according to the general argument on the affirmative side of the question, if such vacancies continue till after the session, they become vacancies *happening* during the recess. It may be said, and, to a certain extent, correctly, that if the President has then power to fill them by temporary appointments, it cannot be abridged by Congress. And this, if we stopped here, might explain the omission to legislate on the subject. But it must be recollected further, that, according to the same argument, the President may fill such vacancies again and again, by temporary commissions on every recurring recess, just as, according to the argument, he may thus repeatedly fill them where the vacancy first occurred in a recess. The act omits all provision against such repetitions of temporary appointments, where the first occurrence of the vacancies was during a session, but provides against them where it was during a recess. According to the argument the necessity was the same, or equally great, in both cases. How is this difference in the legislation to be explained? The only answer to this inquiry is, that Congress discriminated between cases which, in the opinion of the attorney-generals, were, in principle, undistinguishable. The whole subject was perhaps thought to be involved in doubt and obscurity, so much so that perhaps no precisely definable views of the general question of constitutional law are attributable to Congress.

On the whole question of acquiescence, positive or negative, we thus find in the present case, a difference in every respect from those cases in which points of constitutional law have been established on the foundation of administrative usage. We might, for example, contrast the present question with that of the President's power of removal from office.

To recapitulate, as to the present question: There has not been opportunity for judicial contestation: The existence of the power in question has not been legislatively recognised, has been denied by the Senate, has been practically asserted by Presidents only, and has not been exercised without constantly recurring suggestions by them of doubts of its existence under the Constitution: Opinions of attorneys-generals have been its only support; and in these opinions, other jurists of eminence have not concurred.

All this might have been said in language more decidedly showing that the question, whenever directly litigated, will be

quite open for judicial contestation. At present, I cannot answer it affirmatively.

2d. The second question is one upon which opinions have, I believe, differed. It may depend, perhaps, in part, upon congressional usages, of which my knowledge is imperfect. In the present case, there cannot have been a recess of the Senate unless there was a recess of Congress. On every adjournment of Congress, except such an occasional temporary one as does not suspend the course of business of the two Houses, the interval until the next meeting should, I think, be deemed a recess. If so, there was here a recess on the adjournment of 27th July last.

3d. On the third question I incline to think that if the words, "unless it be then otherwise ordered by the two Houses," had not been contained in the resolution of 22d July, the meeting of the Senate on 21st September would have been such a session that the commission of Mr. O'Neill, if otherwise valid, would have expired upon the adjournment on the same day. The insertion of the words which I quote, might not have prevented such a result, if anything had been done *by the two Houses* to make the transaction of executive business by the President and Senate possible, if the President and Senate had desired it. But the adjournment excluded all business, and nothing had been done before it to permit the transaction of any business. The Senate could not, however long they might have sat, receive a nomination to office from the President; and consequently there was, I incline to think, no such session that a temporary appointment, if otherwise valid, would have been terminated by the adjournment which occurred. I would have avoided intimating an opinion upon this point, if it had not seemed necessary, in order to explain my reason for expressing one upon the first question.

Upon the whole, I am of opinion that Mr. O'Neill is not a rightful incumbent of the office, and that any legal business which he may occasionally transact for the Government, under its law department, or any other department, will not be conducted by him as the local law officer. Under the attorney-general's instructions and authorization of the 18th and 22d of September, I think that the clerk of this court should recognise Mr. O'Neill's right of directing process to issue at the suit of the United States.

I consider the office, upon the question of rightful incumbency,
Vol. XVI.—52

to have been vacant, as I have said, from 15th March. But there may be a difference between Mr. Gilpin's authority before the 19th of last month, and Mr. O'Neill's present, or occasional future authority. The existence of such a difference depends upon the question, whether Mr. Gilpin was, until the latter day, the incumbent *in fact*, though not of *right*. Mr. O'Neill cannot, through any future exercise of such authority as he now has, become the incumbent *in fact*, if he is not the incumbent of *right*. His relations with the officers of the court will be thus understood. His occasional authority will be recognised as resting on this footing only, however he may describe it. There will be no implied acquiescence in his own definition of its character. Unless the definition is impliedly concurrent, such acquiescence cannot be inferred. What I have said will prevent any inference of tacit acquiescence from acts of the officers.

The word *happen* imports contingency total or partial, absolute or qualified. But when it thus expires, the Senate In Law Rep. 3 C. P. 316, WILLES, J., may or may not be in session. Upon in view of an absolute contingency, this qualified contingency depends the said: "An *accident* is not the same as the question whether the vacancy *happens* an *occurrence*, but is something that during a recess. The words of the Constitution are "may happen," which perhaps import contingency more strongly *happens* out of the ordinary course of things." In the case of an office whose term is of limited duration, the term than if the word *may* had not been used.

Circuit Court of the United States, Northern District of New York.—In Equity.

CHARLES H. MEAD, ASSIGNEE IN BANKRUPTCY OF EDWIN P. RUSSELL, PORTER TREMAIN, AND AUGUSTUS TREMAIN, v. THE NATIONAL BANK OF FAYETTEVILLE, AND EDWIN P. RUSSELL, PORTER TREMAIN, AND AUGUSTUS TREMAIN.

A creditor of a partnership firm holding notes both of the firm and of the individual partners for a firm-debt, is entitled to prove in bankruptcy his claims on the firm-note against the joint estate, and on the individual notes against the separate estates of the makers.

By the English practice, such a creditor must *elect* which estate he will prove against, but whether such a rule is proper under our Bankrupt Law, *dubatur*.

HALL, J.—The defendants, Edwin P. Russell, Porter Tremain

¹ We are indebted for this case to Hon. N. K. HALL.—EDS. AM. L. R.

and Augustus Tremain, were adjudged bankrupts on the 6th of January, 1868; and plaintiff was appointed their assignee. These defendants had been copartners in business, and on the 5th of December, 1866, were indebted to the other defendant (the bank) in the sum of about \$43,000. This indebtedness was evidenced by sundry notes of the firm, as maker; and each of these notes of the firm bore the indorsement of one of the copartners;—Porter Tremain being such indorser for \$13,500, Augustus Tremain for \$12,000, and Edwin P. Russell for \$17,500. On the day last named, and for reasons not deemed necessary to be determined or discussed, the form of the paper which evidenced such indebtedness was changed upon the application of the officers of the bank, and the firm notes were taken for \$14,000, the notes of Porter Tremain for \$10,000, those of Augustus Tremain for \$9000, and those of Edwin P. Russell for \$10,000. The notes made by the firm were indorsed by Edwin P. Russell, and those made by one of the individual partners, were respectively indorsed by the other two members of the firm. These notes were all given for the previously existing copartnership debt, and they were afterwards renewed by like notes and like indorsements; all the original and renewed notes and indorsements being in fact securities for debts which were the proper debts of the copartnership.

After the adjudication in bankruptcy, the bank being then the holder and owner of the paper thus given in renewal, proved its debts as against the makers alone; that is against the firm and joint estate upon the firm note of \$14,000, and against the individual members of the firm and their separate estates, upon the notes signed by each partner respectively; but did not prove any demand against the separate estates of the copartners upon such indorsements.

There being assets in the hands of the plaintiff belonging to the joint estate of the bankrupts, as such copartners, and also assets belonging to the separate estates of the several individual members of the firm; and the relative amount of those assets being such that the bank would receive a much larger dividend, if allowed to take a dividend upon its debt or debts as thus proved—partly against the firm and partly against the partners individually—the plaintiff, as assignee, filed his bill in this court, and now insists that the whole debt of the bank, being in equity

and in fact the debt of the firm, must be proved as a debt against, and take a dividend from, only the joint estate of the bankrupts ; and that no part of it can be paid out of the separate or individual estates of the bankrupts, in consequence of their individual liability, either as makers or indorsers.

It is impossible for me, at this time, to give this case the careful examination and deliberate consideration its importance deserves, without neglecting other cases having equal claims to an early decision. The counsel who argued the case had, as they said, been unable to find any decision under the Act of 1841 which determined this question ; and my own limited research has brought under my observation but a single case (*Farnum's*, post) in which this question appears to have been decided. In respect to the firm, whatever may have been the legal relations between the bank and the individual partners (see *Babcock's Case*, 3 Story's Rep. 393, 398, and 399), these individual partners, in respect to the notes made or indorsed by them in their individual names, were accommodation makers or indorsers for the benefit of the firm ; and the firm, as between the partners and in equity, must be considered as the principal and primary debtor.

As between the bank and these individual partners, the making or indorsing of these notes created a legal obligation against the individual partner who thus made or indorsed those notes, and the bank might sue upon and enforce such obligation according to its form and terms. It therefore had its election to sue either the maker or the indorser ; and it might, if it chose, have maintained separate suits against the maker and each indorser, and taken a judgment against each. In short, the bank, when these notes were dishonored, was the legal creditor of the several parties thereto, according to the form of their several and respective obligations ; and there is no reason for holding that the legal relation of debtor and creditor thus subsisting did not exist under the Bankrupt Act: *Babcock's Case*, *ubi supra*.

The Act of 1867, § 36, contains, in reference to bankrupt partners, the same provisions in substance as the Act of 1841, § 14 ; and these provisions have been said to be in accordance with the rule as previously established. (See *Marwick's Case*, before Judge WARE, Dav. 229 ; *Collins & Son v. Hood*, 4 McLean's Reports 186, 188 ; *Ingall's Case*, 5 Boston Law Reporter 401.)

These provisions of our statute do not, in terms, prohibit the bank, which had taken the precaution to require the note of the copartnership to be indorsed by the members of that copartnership in their individual names, before giving credit upon it, from proving their debts and taking dividends against the joint and separate estates of these debtors, in virtue of their joint and several liabilities respectively; for the bank was clearly a legal creditor of the individual partners in respect to the notes upon which their individual names appeared, either as makers or indorsers; but the English Court of Chancery (in the absence, it is said, of any statutory provision on the subject) has, it seems, established the doctrine that in cases of bankruptcy a creditor having *knowingly* taken both the copartnership and individual obligation of his debtors for the same debt, must elect whether he will prove his debt against the joint estate or the separate estate of his debtors: Collyer on Partnership, §§ 940-948; Avery & Hobbs's Bankrupt Law 308; Lindley's Law of Partnership (Phila. Law Library), pp. 1013-1025.

This doctrine of election necessarily concedes that the creditor is a creditor of the firm, and likewise of the separate partners whose individual liability he has taken the precaution to exact; and is therefore an authority sustaining the claim of the bank in this case, that they are the creditors of the individual partners upon the notes signed or indorsed by them individually.

The reasonable doctrine that the mere form of the security or evidence of indebtedness does not control in respect to the question whether the debt can be proved against the copartnership, or must be proved against the separate estate of a partner, seems also to be well established in England. See cases referred to by Avery & Hobbs, pp. 309, 310, 311. See also *Agawam Bank v. Morris*, 4 Cush. 99.

Thus, when a firm borrowed money for partnership purposes, and only one of the partners gave a bond for its payment, the other being a witness to it and the money being entered on the cash-book of the firm, it was held that the debt therefor might be proved as a joint debt: *Ex parte Brown*, 1 Atkins 225; *Ex parte Emly*, 1 Rose 61.

In this case it is probable that the bank at its election would have a right to prove its whole debt against the copartnership estate only, if the rules established by the English Court of

Chancery were adopted ; but it is not necessary now to decide whether the bank has such right to prove against the joint estate, or whether it has a right to prove against the firm upon the firm-note, and against the indorsers thereon,—and against the general makers and indorsers of the note not signed in the firm-name,—according to the legal liability of each,—for the bank has not, as yet, insisted upon a right to prove its debts except as against the makers of the several notes which evidence the indebtedness.

Looking to the questions actually presented in this case, I am of the opinion that the bank had a right to prove its debts against the makers of the notes held by it, and is entitled to dividends from the joint and separate estates of the bankrupts, according to such proof. The utmost that can be claimed against the bank is, that it may be driven to its election ; and as it has proved its debts against the makers of the notes, and them alone, no valid objection has been urged against such proof.

It may perhaps be doubtful, whether the bank is compelled to elect according to the English practice in bankruptcy. In the case of *Farnum*, 6 Boston Law Rep. 21, already referred to, the learned judge of the Massachusetts district held, that under the Bankrupt Act of 1841, a creditor who presented a bill of exchange drawn by the firm and indorsed by one of the partners, was entitled to a dividend from the joint estate of the firm, and also a dividend from the separate estate of the partner who made such indorsement ; and he repudiated the English rule which required an election by the creditor under like circumstances. The question seems to have been carefully considered by Judge SPRAGUE, and I confess I regard the rule adopted as more reasonable than that of the English courts ; but if I did not, I should be unwilling to disregard a decision, directly in point, made by that able judge, without very careful and deliberate consideration. The English rule has been disapproved by some of the most eminent judges and ablest lawyers of England ; and Judge SPRAGUE, in the case alluded to, declared that the right of a party holding two valid obligations, to the benefit of both, was founded both in law and justice ; and that he did not think himself authorized to set aside that right on account of an arbitrary rule, justly reprobated by the most eminent judges and jurists in England, and never recognised in this country. This English rule was condemned by Judge STORY, in *Story on Part.*, § 376, *et seq.* ; and in *Borden v.*

Cuyler, 10 Cush. Rep. 478. Judge CUSHING, in delivering the opinion of the court, declared that it remained a mooted question in the United States, and that in Massachusetts the practice and the weight of professional opinion favored the double proof, but that the point had not then been adjudicated. Nor was it adjudicated in that case, or in any other case in our own courts that has fallen under my observation, except in the case of *Farnum* already noticed; and upon the authority of Judge SPRAGUE's decision, and the best consideration I have been able to give to the question presented, I am of the opinion that the bank had, at least, a right to prove its debts and claim dividends in the manner stated in the bill.

It is not, perhaps, necessary now to consider whether the creditors of the individual partners, or rather the assignee as the representative, is not in equity entitled to require that the joint estate shall be deemed a debtor to the assignee as such representative, to the extent of any payments which may be made upon the debt of the bank out of the separate estates of the individual partners, in the same manner that any other party who had made or indorsed similar notes for the accommodation of the firm might have done; and that whether the English doctrine of election is or is not to prevail. The bill states that the assets of the firm, though nominally amounting to about \$50,000, are really worth much less; that the individual assets of the partners over and above encumbrances are about as follows:—Russell's \$7000; Porter Tremain's \$11,000; and Augustus Tremain's about \$3000. The amount of the debts (other than those of the bank) proved against the firm and against the several individual partners is not stated; but the firm was insolvent and bankrupt. It is alleged that Russell individually owed debts amounting, to about \$900, while the two other partners owed no individual debts likely to be proved against individual estates; but I see no statement of the firm or individual debts proved, either in the bill or in the testimony in the case, other than the debts held and proved by the bank.

At all events the question just suggested has not been argued, and a final disposition of it might require a settlement of the accounts of the individual partners with the firm; and as the case decided by Judge SPRAGUE, and the intimation made in the 10th Cushing had not been called to the attention of the counsel

and were not discussed by them, I think it better not to make any decree in this case at present, but to advise the counsel that in my opinion the bank has a right to dividends against the joint and separate estates of the bankrupts, according to their proofs in the case as heretofore stated; and that any other question in the case may be further argued.

Further research by the counsel or myself may lead to the discovery of other cases, decided under the Act of 1841, bearing upon the main question; but I am not able at this time to pursue the investigation.

United States District Court. District of New Jersey.

IN RE WARREN C. ABBE.¹

Where a member of a late copartnership files his individual petition under the Bankrupt Act, and inserts in his schedules debts contracted by said copartnership, and there are no copartnership assets to be administered, he will be entitled to be discharged from all his debts, individual as well as copartnership.

It is not necessary, in such a case, to make the other partners parties to the proceedings, or to have them brought in under General Order No. 18.

The cases of *William H. Little*, Bankrupt Register 74, and of *Alexander Frear*, Id. 201, commented upon.

THE following case and opinion were certified by the Register, W. S. JOHNSON.

The bankrupt first petitions, using the form prescribed for partnership petitions (Form 2). In this petition he sets himself out as a member of "a copartnership lately composed of himself and one Henry C. Read, of Philadelphia." The petition then proceeds in the usual form for partners, alleging inability to pay debts, &c., and closes by praying that the said firm may be declared bankrupts, &c. It also contains the allegation that Abbe has been unable to get his "late copartner, Henry C. Read, to join in this petition." The petition is signed and sworn to by Warren C. Abbe alone. To this petition is attached a schedule showing debts to the amount of \$2456, all of which are stated to have been "contracted as copartner with Henry C. Read, of the late firm of Read & Abbe." The schedules show that there are no partnership assets. Then follows an individual petition (Form

¹ We are indebted for this case to the *Bankrupt Register*.—EDS. AM. L. R.

1), with schedules of individual debts and assets. These disclose but one individual debt, and that small in amount, and no individual assets, except such as are exempt from the operation of the act.

The papers, altogether, then form substantially a petition:—

1st. To have the late firm of Read & Abbe declared bankrupt.

2d. To have Warren C. Abbe declared bankrupt.

3d. To have Warren C. Abbe decreed (upon full surrender, &c.) a certificate of discharge from all his debts, both individually, and as a member of the former firm of Read & Abbe.

On the case coming to me on order of reference, I doubted my power to make such adjudication as is prayed for by the papers, and also as to whether I should certify the papers to be “correct in form.”

The practice in my district has hitherto invariably been for one who was formerly a member of a copartnership to file an individual petition (Form 1), and annex thereto a schedule of his debts, both individual and copartnership, stating opposite each debt in its appropriate place in the schedules, “whether contracted as copartner, &c., or not.” Under this practice, a large number who owed joint and separate debts have been granted certificates of discharge; and the practice was accepted without question as the correct one, until the decision of Judge BLATCHFORD, in the case of *Little*, bankrupt (see Weekly Bankrupt Register 74), was announced. In this decision the ground was taken, that before partnership debts could be discharged, it was necessary to have the firm declared bankrupt, and that this could only be done by each partner joining voluntarily, or by being brought in by notice, under General Order No. 18. Since that decision, I understand the practice in that district to have been modified so as to conform to it, but I am not aware of any other district in which it has been followed in practice.

Aware of this decision, and wishing to have the matter definitely settled, the attorney for the bankrupt in this case drew the papers in the form indicated, that this question might be raised and disposed of in this district. It is within my knowledge that there are a number of cases undisposed of in this district, in which the question as to the effect of a discharge upon an individual petition, upon partnership debts, becomes of great importance.

I do not think I have the power to declare the firm of Read & Abbe bankrupts. The papers show that the firm was dissolved before the filing of the petition by Abbe. No act of bankruptcy is alleged or proved against Read. The petition is signed by Abbe alone. Read has not joined in it, and it is alleged his consent cannot be obtained. He has had no notice of these proceedings. An order might be granted to give such notice to Read, and ordering him, were sufficient acts alleged, to show cause why the firm should not be declared bankrupts, but I do not think it necessary. The only object of Abbe in asking that the firm be declared bankrupts, is alleged to be, that the partnership debts may be discharged as to him. He does not care whether Read is discharged from them or not. All he seeks is, that his own discharge, if obtained, may discharge all the debts, both joint and separate, for which he is now liable. This, I think, would be the effect of a discharge obtained upon his petition, without any reference to Read. My opinion is, if the present papers are regarded as a petition of Abbe's alone, and I adjudicate him bankrupt, and not the firm, that his discharge would cover all debts, both joint and separate. I have therefore refused to grant the first prayer of the papers, and have held that it was not necessary to take any steps as to Read.

It is true that Judge BLATCHFORD's decision, cited above, holds, or seems to hold, differently ; but, with all deference to his honor's learning and ability, I am inclined to doubt its correctness.

It must be evident that if, in order for one partner to rid himself of partnership debts, it is necessary for him to bring in all the other partners, a large number of partnership debts must remain undischarged. In many cases it would be impossible to find the other partners, or if found, to procure their assent, *or to prove acts of bankruptcy sufficient to sustain a petition as against them.*

I think it also evident from the working of the act, that such was not the intention of Congress. Section 83 expressly provides that "no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, indorser, surety, or otherwise," implying that one partner may be discharged from joint debts, though the other is not.

Neither does it seem that the act was so construed by the judges of the United States Supreme Court, who framed the General Orders in Bankruptcy, and the forms of proceeding under the act.

Among the particulars they require to be stated with regard to each debt in schedule A 3, is "whether contracted as copartner, or joint contractor, with any other person, and, if so, with whom," implying that partnership and individual debts may be set out in the same schedule attached to the same petition, the value of each debt being specified.

It was early settled in England that a certificate upon a separate commission discharged both joint and separate debts: see *Horsey's Case*, 3 P. Wms. 23. I have not been able to find any decision reversing this early settlement of the law, but there are several confirming it: see Eden on Bankruptcy 896; Owen on Bankruptcy 297; *Tucker v. Azley*, 5 Cranch 37; 2 Abbott's N. Y. Dig. 479.

But since this case was filed another case has arisen in the Southern District of New York: see *In re Alexander Frear*, Weekly Bankrupt Register 201; in which Mr. Register FIRCH discusses substantially the same questions and arrives at the same conclusions I have, which conclusions seem to be approved, or at least not dissented from, by Judge BLATCHFORD.

I am of the opinion, therefore, 1st, That I have no power to adjudicate the firm of Read & Abbe bankrupts.

2d. That it is unnecessary to allow the papers to be amended or affidavits filed on which to issue an order to bring Read in on notice under General Order No. 18.

3d. That Warren C. Abbe should be adjudicated a bankrupt, that creditors, both partnership and individual, may prove their debts under such proceedings, and that his discharge will be a bar to partnership as well as individual debts.

If the court should hold these opinions correct, I will, therefore, regard the papers simply as the petition of Warren G. Abbe to be discharged from all his debts, both joint and separate, and proceed in all respects the same as has hitherto been done in other cases.

All which is respectfully certified to the honorable court for its opinion thereon.

FIELD, J.—I concur with the Register in the opinion that where a member of a late copartnership files his individual petition, under the Bankrupt Act, and inserts in his schedules debts contracted by said copartnership, and there are no partnership assets to be administered, he will be entitled to be discharged from all his debts, individual as well as copartnership, and that it is not necessary to make the other partners parties to the proceedings, or to have them brought in under General Order No. 1.

I have examined the two cases referred to before Judge BLATCHFORD, and I am not sure that there is any conflict between them. In the case of *William H. Little*, a bankrupt (Bankrupt Register 74), the petition was filed by a member of an existing partnership, the schedule of debts showed that a large portion of the debts were copartnership debts, and the inventory of assets showed that part of the assets was copartnership property. The judge, therefore, considered the petition as, in fact, a petition to have the firm declared bankrupt on the petition of one of its partners. The application was to amend the petition by joining Dana, the other partner, with him in the proceedings; and the court, very properly, allowed the amendment to be made. It is true in giving his opinion the judge said, that until the other partner, Dana, was brought in, Little could not be discharged from the debts of the firm, because the theory and intent of section 36 of the act and of General Orders Nos. 16 and 18 are, that the creditors of a firm should be required to meet but once, and that all questions in regard to the bankruptcy of the firm, and the administration of the assets of the firm, were to be determined in one bankruptcy forum. Now it is very evident that this reasoning would not apply to a case where the inventory did not include any assets of the firm, and where there were no assets of the firm to be administered.

In the other case referred to, that of *Alexander Frear*, Bankrupt Register 201, the petitioner filed his individual petition, praying that he might be discharged from all his debts provable under the Bankrupt Act. The schedules annexed to the petition showed that the petitioner was also a member of a late copartnership which was dissolved some time before the filing of the petition, and that a large number of the debts were copartnership debts. The question before the Register was, whether a copart-

nership debt could be proved. The Register held that it could, and that the petitioner would be entitled to a discharge from all his debts, copartnership as well as individual. Now, if the judge had thought that the Register was wrong in this view of the case, he would certainly have said so. But he does not say so. All he says is, "The debt in question is provable, whether there are any assets of the copartnership or not. *If there are any such assets*, they must be administered according to the provisions of section 36 of the act, and so must the assets of the separate estate of the bankrupt."

From all which I infer the opinion of the judge to be that when there are no assets of a copartnership to be administered, a member of a late copartnership may, upon his individual petition, be discharged from all his debts, copartnership as well as individual. In this opinion I concur, and this is as far as it is necessary for me to go in order to dispose of the present case.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF VERMONT.¹

AGENT.

Competency as a Witness.—The common-law principle, that an agent is a competent witness, either for or against the principal, to prove his acts done, or contracts made, as agent, and his authority therefor from his principal, is equally applicable to the case of a written contract purporting to be executed by an agent in the name and behalf of the principal, as to a case of a verbal contract: *Lytle v. Bond*, 40 Vt.

The main object of Gen. Stat. § 24, ch. 36, providing that no person shall be disqualified as a witness in civil suits, by reason of interest as a party or otherwise, was to *remove*, not to *create*, disqualifications; and the *proviso*, that when one party is dead or insane, the other shall not testify in his own favor, was intended mainly as a limitation or exception to the enabling clause; and this limitation or exception applies only to *parties*: *Id.*

An agent is not a party to a contract made by him in the name and behalf of his principal: *Id.*

Where a note was signed "Richard Bond, by Stillman Clark," it was *held*, that Clark was a competent witness in an action on said note against Bond's estate, after Bond's decease. Clark being an agent is not in legal sense a party to the note: *Id.*

¹ From W. G. Veazey, Esq., Reporter; to appear in 40 Vt. Rep.

The introduction of evidence by one party, that might have been excluded, had the other party objected to it, does not necessarily open the door to the other party to introduce incompetent evidence. But where the evidence introduced is a circumstance morally tending to render the disputed fact more probable, even if so remote as not to be admissible as legal evidence, the other party has a right to do away with the impression it may create in the minds of the jury, by evidence of the same character and force tending directly to meet and explain it: *Id.*

Under this rule, the evidence offered by the defendant and excluded, to the effect that for several years previous to the death of Bond, he had been in the habit of doing business with the Battenkill Bank, &c., was held admissible: *Id.*

Also testimony to show that Bond was a good business man, and accustomed to sign his own name to papers, and to do his own writing, was admissible as bearing on the probability of a statement of a witness in behalf of the plaintiff, that on one occasion Bond called on the witness, a daughter of Clark, to sign his name to a note in his presence, and directed her to sign his name whenever her father wanted her to: *Id.*

Refusal to deliver Goods to Principal.—A refusal, by an agent, to deliver to the principal, goods purchased with funds furnished by the principal, entitles the principal to demand and recover of the agent the funds placed in his hands: *Safford v. Kingsley*, 40 Vt.

A refusal, except upon terms or conditions the other party is not bound to accept, is equivalent to an absolute refusal: *Id.*

The conduct of a party may amount to a refusal. It need not be in words: *Id.*

It is the duty of an agent, who buys goods on commission, to be delivered at a specified place, to separate them from goods of his own of the same kind, left at the same place, and if he neglects, on request, to perform this duty, at the same time claiming that the principal shall take the whole, his conduct amounts to such a refusal to deliver the goods he purchased on commission, as will enable the principal to recover the funds he left with the agent to purchase the goods: *Id.*

A. employed B. to buy, for him, certain lots of butter. B. bought these lots and others, and left the whole together at the railway station, the agreed place of delivery, and claimed that A. should take lots he, in fact, did not order to be purchased. A. wrote B. to meet him at the station, and designate the butter purchased according to order. To this letter B. paid no attention. A. made no attempt to pick out the lots by the marks upon the boxes. It did not appear but he might, by this means, have selected the lots he had directed B. to buy. *Held*, 1. That the request made of the agent was reasonable. 2. That the agent's neglect to comply with it, was equivalent to a refusal to let the principal have the butter unless he would take with it lots he had not authorized the agent to buy. 3. That the principal was not bound to rely on the marks upon the boxes, or to take upon himself the risk of attempting to separate the lots bought by order, from those bought without order. 4. That the principal, A., was entitled to demand and recover of the agent, B., the funds placed in his hands to purchase the butter: *Id.*

BILLS AND NOTES.

Payable on Demand—Reasonable Time of Demand.—The payee of a demand note payable in hemlock bark, given February 19th 1863, demanded payment in the summer of 1863, according to its terms, requesting the defendant to have the bark peeled during the summer, the season for peeling bark, and delivered the next winter, usually the best time to draw it, all which the defendant agreed should be done. *Held*, that this demand was most appropriate to such a note, and the defendant by failing to answer it, as he promised, became liable to pay the note in money. The payee could therefore recover upon the money counts: *Read v. Sturtevant*, 40 Vt.

CONTRACT. See *Limitations, Statute of.*

Memorandum by one Party.—A memorandum of a parol contract, made and signed by one of the parties thereto in his private memorandum book, for his own personal use, is conclusive upon no one. It is not a contract. It is, at most, but a piece of evidence not admissible in favor of the party, except when accompanied by proper parol proof, and not competent against him, except as an admission, the force of which to be determined by proof of the circumstances under which it was made: *Stannard v. Smith*, 40 Vt.

CRIMINAL LAW.

Indictment—Larceny—Duplicity—Evidence.—The indictment in this case alleged that the respondent, on the 9th day of September 1866, one horse of the value of \$300, one buggy wagon of the value of \$150, and one harness of the value of \$50, of the goods and chattels of W., feloniously did steal, take, and carry away, &c. *Held*, not bad for duplicity: *State of Vermont v. Cameron*, 40 Vt.

Held, that the horse, wagon, and harness being taken at one time, constitute but one theft, and cannot be the subject of different indictments: *Id.*

The state, before resting, proved that the respondent, on the 9th day of September 1866, hired a team of W., at Rutland, for a short ride, and, on the 14th, was seen driving a similar team on a cross road in Warrensburgh, N. Y.; that nothing was heard of the respondent or the team for several weeks; that on the 17th day of October 1866, the team was found at Mechanicsville, N. Y. *Held*, that the prosecution made out a *prima facie* case: *Id.*

The respondent's witness, G., having testified that the team in question was bought by respondent's brother, J., of a stranger, at Lake George, N. Y., it was *held* competent for the state to show that J. was then on the jail limits for debt, had failed in business, and had no visible means of support, as tending to contradict G.'s testimony: *Id.*

One of the defences in this case was an *alibi*. The court charged the jury, that in order to convict the respondent the prosecution must establish their whole case beyond a reasonable doubt; but, that if the *alibi* was proven, they must acquit him, and refused, on request, to tell the jury, that in order to convict the respondent they must find, beyond a reasonable doubt, that he was *not* at the place of the *alibi* on the day in question. *Held*, that in this there was no error: *Id.*

The respondent requested the court to charge the jury, that the fact that the respondent had not taken the stand as a witness in his own behalf should not be thought of, or taken into consideration by them to the prejudice of the respondent. This the court refused, saying he could not prevent their thoughts, but charged them, that the respondent's omission to take the witness stand should not be taken against him. *Held*, that in this there was no error: *Id.*

The failure of the court, on request, as in this case, to prevent the prosecuting counsel from arguing to the jury, that the omission of the respondent to testify was evidence against him, constitutes such error and irregularity as to require the verdict to be set aside, and a new trial granted, and is a proper subject of exceptions: *Id.*

EVIDENCE. See *Agent, Contract.*

LIMITATIONS, STATUTE OF.

Promissory Note—Demand—Contract—Consideration.—A note, dated March 14th 1832, "payable in officer's fees as constable," although not in terms expressed to be payable on demand, or on request, is by legal construction so payable; and no demand having been made until 1859, it was *held*, that the note was barred by the Statute of Limitations: *Thrall v. Estate of Mead*, 40 Vt.

Where a debt is payable in specific property, a new contract made before the debt has become payable, changing the mode of payment, and extending the time, needs no new consideration for its support: *Id.*

The general rule in case of such debt is, that no action accrues until request or demand, and that the statute does not commence to run until demand is made, but the creditor may be guilty of such unreasonable neglect in omitting to make demand as will set the statute in operation without demand: *Id.*

Where a note of \$400, dated February 19th 1827, was payable in instalments in grain, the last instalment April 1st 1832, and in June 1829, it was agreed between the plaintiff and maker that the plaintiff should not call for the grain until the last instalment became payable; and in the mean time the maker was to render such services as constable for the plaintiff as he should call for, from time to time, which were to apply on the note; and before April 1st 1832, the parties agreed that the balance due should be postponed to an indefinite period, and that the plaintiff should still continue to receive his pay in the services of the maker as constable, the latter agreeing to render such services as called for from time to time, and if any balance still remained due, after deducting such services, the same should be payable at any time after April 1st 1832, in grain, upon giving reasonable notice to pay in grain, it was *held*, that no new consideration was required to support this agreement, as to mode of payment, or extension of time: *Id.*

This case distinguishable from those where the debt was already due and payable in money when the new agreement was made: *Id.*

The maker having ceased to be constable in 1845, the balance then unpaid on the note became payable in grain upon reasonable notice or demand by the plaintiff, and it was *held*, that six years from 1845, was the limit of a reasonable time in which to make demand, and that after the expiration of that six years the statute began to run: *Id.*

I N D E X.

ACCOUNT. See *AGENT*, 4; *HUSBAND AND WIFE*, 11; *NE EXEAT*; *TENANT IN COMMON*.

ACCOUNT STATED.

A depositor in a bank depositing a draft for collection, and his deposit-book being balanced frequently without having the draft credited to him, and having drawn out the balance remaining to his credit, is estopped after six years from going behind the account stated. *Hutchinson v. Bank*, 188.

ACKNOWLEDGMENT. See *HUSBAND AND WIFE*, 24.

Officer must have legal proof of identity of person making. *Jones v. Bach*, 119.

ACTION. See *ARBITRATION*, 1; *BANKRUPTCY*, 16, 19; *BILLS AND NOTES*, 9; *CORPORATION*, 4, 12, 13; *DEBTOR AND CREDITOR*, 6; *JOINDER*; *MILITARY SERVICE*, 3; *THREATENING LETTER*.

1. Declaration containing common money counts cannot be amended by adding special count upon a lease for damages for not carrying on farm properly. *O'Burt v. Kinne*, 250.

2. Complaint on express agreement will be sustained by evidence of an implied, in N. Y. *Smith v. Lippincott*, 570.

3. For wrongfully raising ore from land in another state and selling and converting proceeds is assignable. *Hoy v. Smith*, 570.

ACTS OF CONGRESS.

1793, March 2. See *BANKRUPTCY*, 8.

1828, May 12. See *BANKRUPTCY*, 2.

1846, Aug. 6. See *OFFICE*, 4.

1850, July 29. See *SHIPPING*, 5.

1856, Aug. 18. See *COPYRIGHT*, 1.

1862, Feb. 13. See *MILITARY SERVICE*, 1.

1864, Feb. 24. See *MILITARY SERVICE*, 1.

1864, June 30. See *INTERNAL REVENUE*.

1864, July 4. See *MILITARY SERVICE*, 1.

1864, July 4. See *BOUNTY*, 2.

1865, March 3. See *CONSTITUTIONAL LAW*, 9, 10.

1866, April 6. See *CONSTITUTIONAL LAW*, 20.

1866, June 14. See *BANK*, 2.

1866, July 13. See *INTERNAL REVENUE*.

1867, Feb. 27. See *CONSTITUTIONAL LAW*, 5.

1867, March 2. See *BANKRUPTCY*; *OFFICE*, 1.

ADMINISTRATOR. See *EXECUTOR*.

ADMIRALTY. See *SHIPPING*.

1. *MATERIAL-MEN AND THEIR LIENS*, 513.

2. A maritime lien does not exist upon a stationary structure like a bridge, and therefore a Court of Admiralty has no jurisdiction of a proceeding *in rem*
VOL. XVI.—53 (833)

ADMIRALTY.

against a bridge to recover damages caused to vessels navigating a public stream. *Galena Packet Co. v. Rock Island Bridge*, 409.

3. Nature and extent of the admiralty jurisdiction *in rem*. *Id.*

4. The fact that one vessel carries a prohibited light does not absolve another from the observance of the caution and nautical skill required by the exigencies of the case. *Greening v. Schooner Grey Eagle*, 226.

5. Although a white light usually represents a vessel at anchor, an omission to watch the light and ascertain from its bearings whether the vessel is in motion, is a neglect of ordinary care and skill, and makes the collision the result of mutual fault. *Id.*

6. There may be circumstances under which a vessel that is unable to show the proper lights may nevertheless continue her voyage at night. *Id.*

7. In navigating a river, omission to observe the usage in proper time renders vessel liable for collision. *The Vanderbilt*, 575.

8. If one of two parties injured by a collision, stands idle until the other has prosecuted his claim to judgment, he cannot share proceeds until the other has been paid in full. *Woodworth v. Ins. Co.*, 63.

AGENT. See **ATTORNEY**; **COIN**, 2; **DEBTOR AND CREDITOR**, 9, 10, 13; **DRED**, 2, 3; **INSURANCE**, 1.

1. In emergencies has power to act for his principal without instructions and is not responsible if his action was in good faith though it turn out badly. *Greenleaf v. Moody*, 184.

2. If general agent acts contrary to special instructions, principal is bound as to third parties. *Edwards v. Schaffer*, 510.

3. Insurance by agent of insurance company to take effect on approval by another agent may be valid without the latter's approval. *Ins. Co. v. Webster*, 571.

4. Duty to render accounts. *Gallup v. Morrill*, 633.

5. Not party to contract signed by him as agent, and therefore competent witness. *Lytle v. Bond*, 829.

6. Refusal to deliver goods to principal except upon terms principal is not bound to comply with, renders agent liable. *Safford v. Kingsley*, 830.

AGREEMENT. See **ACTION**, 2; **CONTRACT**.

AMENDMENT. See **ACTION**, 1.

ANIMAL FERÆ NATURÆ. See **NEGLECT**, 1.

APPRENTICE.

1. Indenture valid where executed will be enforced in another state. *Petrie v. Voorhees*, 696.

2. Covenant to support must be limited to time of service, and if right is settled at law in case where master dies equity will order assets set aside to discharge the duty. *Id.*

3. Provision in will for support may be taken as discharge of the obligation. *Id.*

ARBITRATION. See **INSURANCE**, 12; **PARTNERSHIP**, 10, 11.

1. An agreement under seal to submit to arbitration and a guarantee by a third person not under seal that one of the parties shall abide the award cannot be sued upon in the same action. *Wallis v. Carpenter*, 119.

2. One article of an award being complete and independent may be enforced by itself. *Lamphire v. Cowan*, 185.

3. May be final between the parties though it affect third parties who are not bound by it. *Id.*

4. Award of distinct acts to be done by each party may be separately enforced. Title may pass by the award without further act of parties. *Girdler v. Carter*, 250.

5. Supreme Court will not revise proceedings of a referee except for mistake of law evident on the face of the award. *Smith v. Sprague*, 571.

ARMY. See **MILITARY SERVICE**.

ARREST. See **BANKRUPTCY**, 18; **CRIMINAL LAW**, 6, 7.

ASSIGNMENT. See **ACTION**, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS. See **BANKRUPTCY**, 25, 30.

ASSOCIATION. See **TRUST AND TRUSTEE**, 4.

ASSUMPSIT. See **ACTION**, 1; **ATTORNEY**, 5; **BILLS AND NOTES**, 5; **CONTRACT**, 8; **INSURANCE**, 1; **PARENT AND CHILD**.

1. Under the general issue in *assumpsit*, evidence is admissible to show that the alleged cause of action did not exist at the commencement of the action. *Mason v. Eldred*, 402.

2. Not to be implied between members of family living together. *Wilcox v. Wilcox*, 56.

3. Private promise to pay for performance of work in which the public generally were as much interested as the promisor, will support *assumpsit*. *Smith v. McKenna*, 120.

4. Not maintainable for value of goods wrongfully taken, unless they have been sold and converted into money. *Woodbury v. Woodbury*, 318.

5. Lies for value of goods tortiously taken and sold, or wrongfully sold by one in lawful possession. *Foye v. Southard*, 439.

ATTACHMENT. See **TROVER**, 2; **TRUSTEE**, 1. *

May be valid though for claim on notes not due. *Jordan v. Keene*, 439.

ATTORNEY. See **BOUNTY**, 2; **CUSTOM**, 2.

1. To impart an irrevocable quality to a power of attorney, as the result of legal principles alone, there must co-exist with the power, an interest in the thing or estate to be disposed of or managed, under the power. *Hartley & Morris's Appeal*, 106.

2. In a power of attorney constituting an ordinary agency to enforce settlement of an administrator's account, and to collect any moneys or property that might belong to grantor, a clause allowing the attorneys to have for their services one-half of the net proceeds of what they might recover or receive, does not render the power irrevocable. *Id.*

3. In order to make an agreement for irrevocability, contained in a power to transact business for the benefit of the principal, binding on him, there must be a consideration for it independent of the compensation to be rendered for the service to be performed. *Blackstone v. Buttermore*, 108.

4. Where, in a power with a clause of irrevocability, the agreement was to give the agent a certain sum and portion of the proceeds of the sale he was authorized to make, for his compensation, and he expended, time, labor, and money thereunder, the power was not thereby rendered irrevocable. *Id.*

5. For time, labor, and money expended, a revocation would leave the principal liable on his implied *assumpsit*. *Id.*

6. Has no authority to purchase for his client land sold under mortgage. *Savery v. Sypher*, 571.

7. Service upon is sufficient, except where the proceeding is to bring the party into contempt. *Flynn v. Bailey*, 634.

AUCTION.

Agreement to bid is valid. *Wicker v. Hoppock*, 376.

AWARD. See **ARBITRATION**.

BAGGAGE. See **COMMON CARRIER**, 3-5, 14-16; **RAILROAD**, 20-22.

BAILMENT.

1. A receipt for an article to be returned in three months, with condition that it shall be a sale on payment of a certain price, is a bailment only. *Dunlap v. Gleason*, 185.

2. Bailee may limit time of contract to deliver. *Lance v. Greiner*, 56.

3. Bailee for hire may recover for injury to goods. *Bliss v. Shaub*, 57.

4. Bailment for sole benefit of bailor involves liability of bailee only for gross negligence. *Spooner v. Mattoon*, 696.

BAILMENT.

5. Soldier giving pocket-book to comrade to take care of. *Spooner v. Mattoon*, 696.

BANK. See ACCOUNT STATED; BILLS AND NOTES, 3, 16.

1. Erroneous certificate that note is good. *Irving Bank v. Wettersald*, 352.
2. The penal sanctions of sect. 3, Act of June 14th 1866, to secure the safe keeping of public money, &c., are confined to officers of banks. *U. S. v. Hartwell*, 446.

BANKRUPTCY.**I. Constitutionality.**

1. CONSTITUTIONALITY OF EXEMPTION CLAUSE, 55, 180.
2. So far as conformity in the procedure under executions out of the Federal courts, and out of the courts of the respective states, had been attained under the Act of 1828, and the rules of practice in the Federal courts, the constitutional requirement that the system of bankruptcy should be uniform, has been fulfilled if the bankrupt law operates uniformly upon whatever would have been liable to execution if no such law had been passed, though the subjects of its operation may not be in all respects the same in every one of the states. *Re Appold*, 624.

II. Jurisdiction.

3. JURISDICTION OF U. S. CIRCUIT AND DISTRICT COURTS, 642.
4. Where a judgment-creditor levies an execution from a state court and the debtor files a petition in bankruptcy, the Court of Bankruptcy may either allow the creditor to proceed with the execution, or may enjoin him and direct the assignee to take possession and sell the goods, with leave to the creditor to apply for an order directing the payment of his judgment out of the proceeds. *Matter of Schnepf*, 204.
5. Jurisdiction of Bankruptcy Court over creditors proceeding in state courts. *Note to Schnepf's case*, 206.
6. Congress, by the Constitution of the United States, had the right to bring all parties, estates, and interests connected with a bankrupt into the District Court of the United States as a Court of Bankruptcy; and to confer upon the District Courts the authority to suspend all and every proceeding elsewhere; and to command obedience to their mandates, exclusive of all other jurisdictions. But, by the Bankrupt Act of 1867, they have not done so. *Matter of Campbell*, 100.
7. This act does not authorize the District Courts of the United States to issue injunctions to state courts, nor to the actors or parties litigating before them. *Id.*
8. The Act of 2d March 1793 prohibits it; and this act is not repealed by the Bankrupt Law, either in express terms, or by implication. *Id.*
9. Courts of a state are independent tribunals, not deriving their authority from the same sovereign, and as regards the District Court of the United States, foreign tribunals, every way its equal, and over which the District Court has no supervisory power, and the Bankrupt Law does not change the relation of these courts to each other. *Id.*
10. The authority conferred by the 40th section, to issue an injunction against the bankrupt, and all other persons, has no reference to the state courts, and it is a limitation of the sweeping provisions of the 1st section. *Id.*
11. It was designed to protect the property of a party not yet declared a bankrupt, until his bankruptcy has been legally established. *Id.*
12. The principle decided in *Campbell's Case*, that the District Courts of the United States have no power to issue injunctions to state courts, affirmed. *Matter of Burns*, 105.
13. A judgment cannot be assailed in the Bankrupt Court, but the assignee and creditors must resort to the state court, to test its validity. *Id.*
14. In a case of involuntary bankruptcy in which the debtor, being insolvent, or, having insolvency in contemplation, and intending to give a preference, or to defeat or delay the operation of the Bankrupt Law, has, within six months before the commencement of the proceedings in bankruptcy, given to

BANKRUPTCY.

a creditor who had reasonable cause to believe that a fraud on this law was intended, or that the debtor was insolvent, a warrant of attorney under which judgment has been confessed in a state court, and an execution has been levied upon his stock in trade, which has not as yet been sold under it, the present Bankrupt Law gives to the courts of the United States, jurisdiction to prohibit such creditor, by injunction, from proceeding further under such execution. *Irving v. Hughes*, 209.

15. The District Court, instead of issuing such an injunction under the summary jurisdiction in bankruptcy, may refuse to consider the subject unless under a distinct auxiliary proceeding in equity against such a creditor. The bill at the suit of the petitioning or any intervening creditor, may then be prosecuted in the Circuit Court on behalf of the general body of creditors, until the assignment in bankruptcy, after which the assignee may be substituted or added as a complainant; and if the proceedings in bankruptcy are duly prosecuted, a preliminary injunction issued by the Circuit Court may, in a proper case, be continued after answer, under such conditions as will preserve the priority of the creditor thus restrained if the lien of his execution should ultimately be established. *Id.*

16. An unimpugned creditor's lien having, before the commencement of voluntary proceedings in bankruptcy, attached upon part of the bankrupt's estate, no consideration of probable sacrifice of the subject of the lien under judicial proceedings for its enforcement in a state court, will induce a court of the United States to restrain, delay, or hinder the creditor from prosecuting them. No equity of the general body of the bankrupt's creditors can be asserted for their common, equal benefit, on the mere ground of doubtfulness of his title to the subject of the lien and the danger of consequent sacrifice at a forced sale. *Quere*, whether such an equity can be asserted on their behalf in any case without such a payment of his demand as may substitute the assignee in bankruptcy for him as to the lien. *Ex parte Donaldson*, 213.

17. A debtor made an assignment under the insolvent law of Ohio on May 25th 1867, and under it a state court took cognisance of the matter. On July 17th a petition in bankruptcy was filed by a creditor. *Held*, that as to this matter the Bankrupt Act of 1867 was in force on May 25th, and the United States court could rightfully take jurisdiction of the whole matter under the petition filed in July. *Perry v. Langley*, 429.

18. Where a bankrupt is held under arrest upon state process, in an action of tort in the nature of deceit, it being alleged in the declaration, that he obtained possession of the plaintiff's goods under color of a contract by means of false and fraudulent representations, the United States District Court has no power to discharge the bankrupt upon a *habeas corpus*. *Re Devos*, 690.

19. Evidence cannot be received to contradict the declaration, and to show that no such cause of action really exists as is therein set forth. *Id.*

III. Acts of Bankruptcy. See post, 55, 56.

20. In deciding whether giving a warrant to confess judgment is an act of bankruptcy, the character, &c., of the alleged bankrupt's business may be taken into consideration. *Matter of Leeds*, 693.

21. A suspension of payment of commercial paper for fourteen days is not, unless fraudulent, an act of bankruptcy. *Id.*

22. A stopping of payment of his commercial paper by a merchant or banker, in order to constitute an act of Bankruptcy under sect. 39 of the Bankrupt Act, must be both fraudulent at first and be continued for fourteen days. *Matter of the Jersey City Window Glass Company*, 419.

23. But a stoppage continued for fourteen days is *prima facie* fraudulent, and casts on the debtor the burden of proving his solvency and that his stoppage will not have the effect of defrauding any creditor. *Id.*

24. A petitioning creditor, in proceedings for involuntary bankruptcy, not having alleged that the debtor's stoppage for fourteen days was fraudulent, was allowed to amend his petition by adding that allegation. *Id.*

25. A general assignment for the benefit of all his creditors, by an insolvent debtor, prior to the 1st of June 1867, is not necessarily fraudulent nor for the

BANKRUPTCY.

purpose of delaying or hindering creditors, and, therefore, not necessarily an act of bankruptcy. *Re Wells and Son*, 163.

26. Section 39 of the Bankrupt Act, in enumerating among acts of bankruptcy the fraudulent stopping of payment of his commercial paper by a banker, merchant, &c., embraces two cases:—

1. A *fraudulent* stoppage, which is *per se* an act of bankruptcy, for which proceedings may be immediately commenced; and

2. A stoppage not fraudulent, but which becomes an act of bankruptcy by continuing for fourteen days. *Id.*

27. A general assignment by an insolvent debtor, though made for the benefit of all his creditors, is an act of bankruptcy. *Perry v. Langley*, 429.

28. Where a creditor is about to get a judgment against his debtor, and the latter makes a general assignment under a state insolvent law for the benefit of his creditors, this is a conveyance with intent to delay, defraud, and hinder the creditor, and an act of bankruptcy under sect. 39 of Bankrupt Act. *Id.*

29. It comes also under the description of a conveyance to defeat or delay the operation of the Bankrupt Act. *Id.*

30. Where a debtor made an assignment under a state insolvent law, and a creditor applied to the state court to have the security of the assignees increased, this was not such an assent to the proceedings as estopped him from claiming that the assignment was an act of bankruptcy. *Id.*

IV. *Effect of the institution of proceedings.*

31. Liens, by the Bankrupt Law, are held sacred, and the creditor is expressly protected by the 14th, 15th, and 20th sections of the act. *Matter of Campbell*, 100.

32. The bankrupt's final certificate discharges his person and future acquisitions; but the lien-creditor is entitled to satisfaction out of the property subject to lien. *Id.*

33. The lien of a levy made by a judgment-creditor under an execution from a state court, is not disturbed by the debtors filing a petition in bankruptcy. *Matter of Schnepf*, 204.

34. A debt fraudulently contracted is not discharged, and the court will not therefore interfere to prevent the creditor from enforcing his claim by imprisonment, even during the pendency of the proceedings in bankruptcy, unless such interference be necessary to enable the court to exercise its proper jurisdiction in the case. *Re Pettis*, 695.

V. *Practice.* See *ante*, 4, 24; *post*, 51, 52, 61.

35. Where a creditor made a motion for an order to examine a bankrupt before the first meeting of creditors, and the bankrupt objected that no such order could be made at such time, this raised an issue of law which the register should have certified to the court. *Matter of Patterson*, 26.

36. But if the bankrupt argues and submits the question to the judgment of the register, he waives his right to a certificate, and if, after a decision against him, he submits his points and requests an adjournment to the court, he is too late. After a decision by the register there is no issue to certify. *Id.*

37. A creditor has a right to prove his claim at any time after the commencement of proceedings, and having done so has a right to an order for the examination of the bankrupt under section 26, without waiting for the meeting of creditors. *Id.*

38. If depositions in proof of claims are filed before the day appointed for the meeting of creditors, the register is not bound to notify the bankrupt. *Id.*

39. Notwithstanding the filing of such a deposition and entering the claim on the list, the register may still, under section 23, at the first meeting of creditors postpone the proof of the claim and exclude the creditor from voting in the choice of an assignee. *Id.*

40. The court has, under section 22, full control at all times, of all debts, and all proofs of debts, even after the depositions in proof have been filed; and the bankrupt can, at the first meeting of creditors, object, under section 23, to the validity of, and the right to prove any debts, without regard to the time the depositions in proof were filed. *Id.*

BANKRUPTCY.

41. A creditor holding security, although he has proved his debt under section 22, cannot vote in the election of an assignee. *Matter of Davis & Son*, 30.

42. The creation of a debt by fraud is not a ground for refusing a discharge to a bankrupt. *Matter of Rosenfield*, 618.

43. A specification stating that debt had been created by fraud is not a good specification, and will be stricken out on motion. *Id.*

44. A bankrupt cannot be examined for the purpose of showing that the debt was created by fraud. *Id.*

45. A fraudulent conveyance made, or a fraudulent preference given, before the passage of the Bankrupt Act, are neither of them good grounds upon which to oppose a discharge. Such a conveyance or preference does not come within the terms of section 29 of said act, and a specification alleging such a conveyance or preference will be stricken out on motion. *Id.*

46. The difference explained between the meaning of the following phrases in section 29, viz.: "Since the passage of this act," and "subsequently to the passage of this act." *Id.*

47. By the term "fraudulent preference," used in item nine of section 29, is meant only a preference in fraud of the Bankrupt Act, that is, contrary to its provisions. *Id.*

48. Where a member of a late copartnership files his individual petition under the Bankrupt Act, and inserts in his schedules debts contracted by said copartnership, and there are no copartnership assets to be administered, he will be entitled to be discharged from all his debts, individual as well as copartnership. *Re Abbe*, 824.

49. It is not necessary, in such a case, to make the other partners parties to the proceedings, or to have them brought in under General Order No. 18. *Id.*

50. The cases of *William H. Little*, Bankrupt Register 74, and of *Alexander Frear*, *Id.* 201, commented upon. *Id.*

VI. Discharge. See *ante*, 34, 42, 45, 48.

51. Where at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one in which no assets have come into his hands. *Matter of Dodge*, 438.

52. Any creditor of a bankrupt may oppose the discharge, whether he have proven his debt or not. *Matter of Shepard*, 484.

VII. Property exempted.

53. Under the present bankrupt law of the United States and the state exemption laws incorporated with it, the exemption of such property, real or personal, of the appraised value of \$300, as a bankrupt in Pennsylvania may elect to retain as exempt under the laws of the state, is not included in but is additional to the exception from the operation of the bankrupt law, of such necessary and suitable articles, not exceeding in value \$500, as with due reference, in their amount, to the bankrupt's family, condition, and circumstances, may be designated and set apart by the assignee, subject to the court's revision. *Re David Ruth*, 157.

54. But this exception to the full value of \$500, ought not to be allowed in all cases, without discrimination or measure. *Id.*

VIII. Rights and Duties of Assignee. See *ante*, 4, 15.

55. An assignee in bankruptcy may maintain an action to set aside a fraudulent conveyance by the debtor before he was adjudged a bankrupt, even though the conveyance was before the passage of the Bankrupt Act. *Bradshaw, Assignee, &c., v. Klein*, 505.

56. Such action is not limited to conveyances made within six months of the filing of the petition. The general language of the 14th section of the Bankrupt Act is not limited in this respect by the 35th section. *Id.*

57. *Quære*, Whether under the present bankrupt law of the United States, goods of the estate in the hands of the assignee are distrainable for rent? *Re Appold*, 624.

58. If they are not, it is because they are not less in legal custody than goods taken in execution; and under the equity of any laws of the respective

BANKRUPTCY.

states which, like the English statute 8 Ann. c. 14, entitle a landlord to payment of rent accrued, not exceeding one year's, out of the proceeds of goods sold under an execution, the landlord, who is prevented from distraining, may demand such an amount of rent from the assignee in bankruptcy. *Re Appold*, 624.

59. Such a rule of decision is not inconsistent with apparently contrary decisions under the English system of bankruptcy. *Id.*

60. Though rent, as such, may not accrue during the proceedings in bankruptcy, an equal charge for storage may, for a certain period, under certain circumstances, be incurred by the assignee. *Id.*

IX. *Proof of Debts.* See *ante*, 37-41; *post*, 74; CONFEDERATE STATES, 1.

61. A creditor who has proved his debt has a right to examine a bankrupt under section 26 of the act, although his debt may appear to be barred by the Statute of Limitations of the state in which the proceedings are instituted. *Matter of Ray*, 283.

62. A debt barred by the Statute of Limitations is not "due and payable" so as to be provable in bankruptcy, but as there is no limitation in the Bankruptcy Act whose operation is coextensive with the limits of the United States, no claim can be held barred unless it be shown that it is not recoverable in any part of the United States. *Id.*

63. A debt barred by the Statute of Limitations of the state where the bankrupt resides cannot be proved against the estate in bankruptcy. *Matter of Kingsley*, 423.

64. The entry of a debt upon the schedule by a bankrupt is not such an acknowledgment or new promise as will revive the debt. *Id.*

65. A debt against a bankrupt's estate may be proven before a United States commissioner, although the bankrupt and creditor both reside in the same judicial district. *Matter of Shepard*, 484.

66. A debt barred by the Statute of Limitations of the state in which the bankrupt resides may still be proven against his estate in bankruptcy. *Id.*

67. A creditor who, after making his deposition to prove his debt, retains possession of the deposition and does not allow it to pass into the hands of the assignee in bankruptcy, is not a creditor who has proven his debt. *Id.*

X. *Distribution.*

68. Where there are both individual and partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to the bankruptcy, and being principally the same goods in the purchase of which the partnership debts had originated; the partnership creditors will be entitled to be paid *pari passu* with the individual creditors. *Matter of Jewett*, 291.

69. Where A., one of two partners, sells his interest in the concern to his copartner, B., taking his notes therefor, and B. becomes bankrupt, leaving some of the notes unpaid, A. cannot receive a dividend from the assignee until all the partnership debts have been paid. *Matter of Jewett*, 294.

70. A *bond fide* transfer of partnership effects by one member of the partnership to another vests the title in the transferee as his separate estate. *Matter of Byrne*, 499.

71. Where there are both joint and separate debts, proved in a bankruptcy on a separate petition, the joint creditors are not entitled to participate in the distribution of the assets until the separate creditors are paid in full. *Id.*

72. The exception in the general rule of law, which allows joint creditors to receive dividends *pari passu* with the separate creditors in cases where there is no joint estate and no solvent partner, is inoperative under the Bankrupt Law of 1867. *Id.*

73. A. transferred his interest in partnership effects to his copartner B., on the 2d of October, on his (B.'s) promise to pay the firm debts; without buying any new stock or making any effort to continue the business, B. filed his petition in bankruptcy on the 7th of October: *held*, that the transfer was accepted by B. in contemplation of filing his petition in bankruptcy, and that the transfer was void as a fraud on the creditors of the partnership. *Id.*

74. A creditor of a partnership firm holding notes both of the firm and of

BANKRUPTCY.

the individual partners for a firm-debt, is entitled to prove in bankruptcy his claims on the firm-note against the joint estate, and on the individual notes against the separate estates of the makers. *Meud v. Nat. Bank of Fayetteville*, 818.

75. By the English practice, such a creditor must *elect* which estate he will prove against, but whether such a rule is proper under our Bankrupt Law, *dubitat*. *Id.*

XI. Costs.

76. A party may serve a subpoena on his witnesses, and in cases where he succeeds in the trial recover his costs therefor. *Gordon v. Stott*, 749.

77. In cases of involuntary bankruptcy and a trial by jury, a docket fee of \$20 is taxable in favor of the counsel of the successful party. *Id.*

78. In proceedings in voluntary bankruptcy a docket fee is not taxable, except in those voluntary cases, when under the 31st section of the act the court is authorized to direct a trial upon specifications of objections to the bankrupt's discharge. *Id.*

79. The word trial in the Bankrupt Act means a trial by jury. *Id.*

BASTARDY.

Money paid on affiliation order is solely for support of child. *Drake v. Sharon*, 571.

BIGAMY. See HUSBAND AND WIFE, 2, 3.

BILL OF CREDIT. See CONFEDERATE STATES, 2.

BILL OF LADING. See COMMON CARRIER, 7; VENDOR, 15-18.

BILLS AND NOTES. See BANKRUPTCY, III; EVIDENCE, 6; PARTNERSHIP, 1-4; STAMPS, 3; SURETY, 1.

I. What is a Negotiable Instrument.

1. Instrument "payable out of my separate property and estate" is a promissory note. *Skillen v. Richmond*, 251.

2. Signed by mark may be good, and if signature not denied it is held admitted under rule of court. *Willoughby v. Moulton*, 251.

3. Certificate of deposit payable on presentation is negotiable. *Bank v. Bank*, 758.

4. Note for sum certain, "and such additional premium as may become due," not negotiable. *Marrett v. Ins. Co.*, 440.

II. Consideration.

5. Note being void for want of stamp payee may recover in *assumpsit* on original consideration. *Wilson v. Carey*, 634.

III. Rights and Liabilities of Parties. See HUSBAND AND WIFE, 27.

6. A promissory note being presented by one bank at another bank where it was made payable, was certified to be good and was then stamped "paid" by the presenting bank, but on the same day the maker's want of funds being discovered, notice was given to the presenting bank, which however declined to cancel the certificate. The certifying bank then paid the amount, took the note and re-presented it at its own counter, had it duly protested and notified the indorsers. *Held*, that the facts did not amount to payment of the note and the bank was entitled to recover from the indorsers. *Irving Bank v. Wethe-rald*, 352.

7. The certifying bank having given notice of its mistake to the presenting bank before the latter had done or omitted any act by which its rights were impaired, the certifying bank was released from liability on its erroneous certificate, and need not have paid the amount of the note. *Id.*

8. Indorsement by several is only *prima facie* evidence of the contract as between themselves, though it is conclusive between them and third parties. *Smith v. Morrill*, 186.

9. B. and C. gave joint note to A. for land; C. conveyed his interest to B.; action for money had and received lies by A. against B. for the whole amount. *Woodbury v. Woodbury*, 318.

BILLS AND NOTES.

10. Indorsement by A. of B.'s name in B.'s presence and by his direction is good. *Woodbury v. Woodbury*, 318.
11. Any defence against payee may be made against holder not *bona fide* for value. *Van Valkenburgh v. Stupplesben*, 380.
12. Holder as security may refuse to deliver until payment of the debt. *Benoir v. Paquin*, 634.
13. Circumstances to put holder on inquiry. *Id.*

IV. Demand and notice.

14. Acts amounting to waiver of demand and notice. *Keyes v. Winter*, 439.
15. Note "payable in officer's fees," &c., is payable on demand. *Thrall v. Mead*, 832.
16. Holder of certificate of deposit payable to order of A. on presentation cannot sue until demand has been made. *Bank v. Bank*, 758.
17. Demand note payable in goods if not paid on demand at reasonable time becomes payable in money. *Read v. Sturtevant*, 831.

BLOCKADE. See INTERNATIONAL LAW.

BOND. See COURTS, 5; MUNICIPAL CORPORATION, 3; STAMP, 4, 5.

1. Coupon detached from bond is still lien under the mortgage. *Miller et al. v. R. R. Co.*, 762.
2. Coupon is part of the mortgage-debt, and holder on foreclosure is entitled to share *pro rata*. *Id.*
3. Loss of bond no objection to its payment on indemnity furnished. *Id.*

BONDED WAREHOUSE. See VENDOR, 20.

BOUNTY.

1. Town voting to pay bounty to those who should enlist and be credited to its quota, bound to pay those enlisted prior thereto, but mustered in and credited to quota subsequently. *Johnson v. Newfane*, 634.
2. The 12th and 13th sections of the act of 1864, limiting the compensation of agents for making the necessary papers to establish a claim for pension, bounty, or other allowance before the pension office, to ten dollars, and declaring it to be a high misdemeanor for any such person to demand or receive any greater compensation than ten dollars for his services under the Pension Act, &c., is not unconstitutional. *U. S. v. Fairchilds*, 306.

BRIDGE. See ADMIRALTY, 2; CONSTITUTIONAL LAW, 5.

BROKER. See MILITARY SERVICE, 2, 3.

1. Real estate broker is the agent of vendor, and his services must be the efficient cause of the sale. *Earp v. Cummins*, 311.
2. Purchase of stock on margin not a pledge for payment of money requiring notice to make legal sale. *Hanks v. Drake*, 381.
3. Broker has right to call on his principal to make good his margin, and on failure in reasonable time, to sell. *Id.*
4. Two hours not reasonable time, without further evidence, but acts of principal may amount to ratification. *Id.*
5. If after demand principal fails to make good his margin, broker may sell without further notice. *Markham v. Jordan*, 572.

CASES APPROVED, OVERRULED, ETC.

- Campbell's Case, *ante* 100, affirmed. *Matter of Burns*, 105.
- Canal Co. v. Sansom, 1 Binn. 70, criticised. *Mining Co. v. Levy*, 312.
- Frear's Case, Bankrupt Reg. 201, commented on. *Re Abbe*, 824.
- Little's Case, Bankrupt Reg. 74, commented on. *Re Abbe*, 824.
- N. J. Railroad Co. v. Kennard, 9 Harris 203, overruled. *P. & C. R. R. Co. v. McClurg*, 277.
- Palmer v. Ridge Mining Co., 10 Casey 288, criticised. *Mining Co. v. Levy*, 312.
- Reese v. Montgomery Co. Bank, 7 Casey 78, explained. *Curry v. Scott*, 313.
- Sheehy v. Mandeville, 6 Cranch 254, criticised. *Mason v. Eldred*, 402.

CERTIFICATE OF DEPOSIT. See **BILLS AND NOTES**, 3, 16.

CHECK.

Not an assignment of funds. *Lunt v. Bank*, 376.

CITIZEN. See **CONFEDERATE STATES**, 5; **CONSTITUTIONAL LAW**, 1, 4; **TEXAS**.

CIVIL RIGHTS BILL. See **CONSTITUTIONAL LAW**, 20

COIN.

1. Depositor in bank having a balance to his credit in coin, and also in treasury notes, drew for coin, but was tendered notes only—evidence of custom of banks to pay coin for checks on such balances not admissible. *Thompson v. Riggs*, 122.

2. In action against an agent for refusing to deliver bonds bought for the principal, the latter may, as an element of damages, prove that the bonds were payable in gold coin, and also the premium on coin. The Legal Tender Acts do not exclude such evidence from the jury, nor do they allow an agent to receive gold and pay currency to his principal. *Simpkins v. Low*, 508.

COLLATERAL INHERITANCE TAX. See **TAXATION**, 3.

COLLISION. See **ADMIRALTY**.

COMMISSIONS. See **TRUST**, 5.

COMMON CARRIER. See **RAILROAD**; **STAMP**, 1; **TELEGRAPH COMPANY**.

1. A person receiving a printed notice on his ticket or check at the time of delivering his goods to a carrier is to be charged with actual knowledge of the contents of the printed notice. *Hopkins v. Westcott*, 533.

2. Where such a notice stated that the carrier would not be responsible "for an amount exceeding \$100 upon any article," the words "any article" mean any separate article, not a trunk with its contents. *Id.*

3. Therefore, a traveller who gave a single trunk to a carrier and received such a notice, was allowed to recover the value of separate articles in the trunk amounting to \$700. *Id.*

4. Baggage includes such articles as are usually carried by travellers. Books and even manuscripts may be baggage, according to the circumstances and the business of the traveller. *Id.*

5. In this case a student going to college was allowed to recover the value of manuscripts which were necessary to the prosecution of his studies. *Id.*

6. A carrier may by special contract limit his liability except as against his own negligence. *Farnham v. C. & A. R. R. Co.*, 172.

7. Where a person delivers goods to a carrier and receives a bill of lading expressing that the goods are received for transportation subject to the conditions on the back of the bill, by one of which the carrier's liability is limited to a certain rate per lb., this constitutes a special contract by the parties, and the carrier, in the absence of proof of negligence, is only liable at the rate agreed upon. *Id.*

8. Goods were received by defendants, a railroad company, under a special contract as set forth in the preceding paragraph, and were safely carried to their wharf at New York, and placed on the wharf ready for delivery, but before the plaintiffs had notice of their arrival or opportunity to remove them, a fire broke out on board a steamer of the defendants lying at the wharf, which entirely consumed the boat, and also the wharf and the goods thereon. There was no evidence as to the origin of the fire. *Held*, that plaintiffs could not recover more than the special rate agreed upon without proving negligence of the defendants. *Id.*

9. May by express stipulation limit liability even for negligence. *Prentice v. Decker*, 377.

10. Mere acceptance of card or ticket with limitation of liability will not establish a contract on part of passenger. *Id.*

11. Cannot limit liability by note on card or ticket, unless there is further evidence of agreement by other party than the mere acceptance of the card. *Limburger v. Westcott*, 507.

COMMON CARRIER.

12. Cannot limit liability so as to excuse want of ordinary care. *Mann v. Birchard*, 702.
13. Burden is on plaintiff to show want of ordinary care, but unusual delay in delivery is *prima facie* evidence. *Id.*
14. Not liable for loss of baggage not claimed by traveller in reasonable time after end of journey. *Jones v. Trans. Co.*, 634.
15. Seventeen hours held not a reasonable time under the circumstances. *Id.*
16. Fact that journey ended on Sunday and the law of the state prohibited work or travelling on that day did not affect the case. *Id.*
17. In action for delay in transporting flour, decline in market value is proper element of damages. *Weston v. R. R. Co.*, 440.
18. Allegation of special damage. *Roberts v. Graham*, 377.

CONDITION. See **WILL**, 9.

CONFEDERATE STATES. See **INSURANCE**, 10.

1. A promissory note, the consideration of which was a loan of Confederate money, is not provable as a claim in bankruptcy against the maker. *Matter of Milner*, 371.
2. Confederate treasury notes were not bills of credit within the prohibition of the Constitution of the United States; but were illegal, because issued by a pretended and revolutionary government set up within the limits of the United States. *Id.*
3. Confederate treasury notes were not an illegal consideration in contracts between citizens of the Confederate States, unless it was the *intent* of the parties to the contract *thereby* to aid the rebellion. *Phillips v. Hooker*, 40.
4. Therefore, where one citizen of North Carolina, in 1862, bought a house of another, paid for it in Confederate notes, and went into possession, the contract cannot be set aside by a court as founded on an illegal consideration. *Id.*
5. Citizens faithful to the United States who resided in the seceding states during part of the war, but escaped to the loyal states or neutral countries, lost no rights by temporary residence in the seceding states. *The Peterhoff*, 62.

CONFLICT OF LAWS. See **APPRENTICE**, 1; **BANKRUPTCY**, II.; **REAL ESTATE**, 2.

CONSIDERATION. See **BILLS AND NOTES**, 5; **CONFEDERATE STATES**, 3; **CONSTITUTIONAL LAW**, 8; **CONTRACT**, 9-13; **DEBTOR AND CREDITOR**, 4, 5; **DEED**, 4.

CONSTITUTIONAL LAW. See **BANKRUPTCY**, I.; **BOUNTY**, 2; **COIN**; **CONFEDERATE STATES**, 2; **MILITARY SERVICE**, 1.

I. *Power of Executive.* See **OFFICE**, 1, 2.

II. *Power of Congress.* See **OFFICE**, 1, 2.

1. Congress may deprive a criminal of his citizenship and thereby affect his right to vote, but the direct regulation of the qualification of voters in a state is not in the province of Congress. *Huber v. Reily*, 57.

III. *Power of Legislature.* See **CORPORATION**, 9; *post*, 15-19.

2. Prohibition against legislative allowance of any private claim extends to claims against counties as well as the state. *People v. Sherman*, 186.

3. Legislative control over tide-waters—rights of riparian owners to water in front of them. *Steamboat Co. v. Transportation Co.*, 759.

IV. *Judicial Power.* See **COURTS**; *post*, 18.

V. *Right of Free Passage from State to State.*

4. Special state tax on railroad companies for passengers carried out of the state by them is not void as a duty on exports nor as a regulation of commerce, but it is in derogation of the Federal Government's right to require the presence and service of its citizens at any point where the functions of government are to be performed, and also of the citizen's right of free access

CONSTITUTIONAL LAW.

to the seat of government or any public Federal offices. *Crandall v. Nevada*, 440.

VI. *Regulation of Commerce.* See *ante*, 4.

5. The act of 1867 declaring a bridge across the Mississippi river at Clinton "a lawful structure and a post-route," is constitutional; and under it the Circuit Court of the United States will dismiss a bill to procure the abatement of the bridge as a nuisance, based on the ground that it presents a serious obstruction to the navigation of the river, although the suit for this purpose was pending at the time the Act of Congress was passed. *Gray v. Clinton Bridge*, 149.

6. The power of Congress to regulate commerce extends to commerce on land, carried on by railroads which are parts of lines of inter-state communication as well as to commerce carried on by vessels: and such railroads may be regulated by Congress as well as steamboats: Per MILLER, J. *Id.*

7. The commercial clause of the Constitution expounded by MILLER, J., in reference to railways and boats as instruments of commerce. *Id.*

VII. *Obligation of Contracts.*

8. A legislative concession embraced in the charter of a corporation perpetually exempting its property from taxation, without a sufficient corresponding consideration yielded by the corporation, is revocable at the pleasure of the state. And the act of the state in revoking such a concession, is not unconstitutional as impairing the obligation of a contract. *Rouse v. Washington University*, 390.

VIII. *Due Process of Law, and Ex post facto Laws.*

9. What "due process of law" includes. A deserter is not deprived of his right to vote by the Act of 1865 until adjudged a deserter by court-martial. *Huber v. Reily*, 57.

10. Act of 3d March 1865, imposing penalty for desertion, is not *ex post facto*. *Id.*

IX. *Taking Private Property.*

11. Legislature may authorize construction of public works without compensation to property injured if not actually taken. *Arnold v. R. R. Co.*, 380.

12. Public bridge belonging to county not within the constitutional prohibition. *Freeholders, &c., v. Turnpike Co.*, 759.

13. But a charter to turnpike company requiring it to pay owners of lands includes county bridge. *Id.*

14. Even if damages for taking such bridge were only nominal the county is entitled to restrain the use of it until damages are assessed and title has passed to the company. *Id.*

15. Legislature has no power to transfer one man's property to another without his consent, even with compensation. It is not an exercise of the law-making power given to the legislature. *Coster v. Tide Water Co.*, 760.

16. Grant of power to one man to improve property of another without his consent at compensation to be fixed by third person, is void as beyond the powers of the legislature. *Id.*

17. Private property may be taken by eminent domain for public use on adequate compensation, but the use meant is by the government itself or the general public or some portion of it. *Id.*

18. Whether the use in question is a public use is a judicial question. *Id.*

19. Eminent domain and taxation may be employed to reclaim large tracts of land, and the question of using these powers for such purpose is with the legislature, but to compel the owner to bear the expense of improvement beyond his particular advantage is taking his property without compensation and unconstitutional. *Tide Water Co. v. Coster*, 761.

X. *Abolition of Slavery.*

20. Under the 13th Amendment, abolishing slavery and giving to Congress "power to enforce this Article by appropriate legislation," the Act of 1866, known as the CIVIL RIGHTS LAW, is constitutional. *United States v. Rhodes*, 233.

CONSTITUTIONAL LAW.

21. Under this act all persons stand upon a plane of equality before the law, as respects the civil rights therein mentioned and intended to be protected, without distinction as to race or color or any previous condition of slavery. *United States v. Rhodes*, 233.

22. If a state law denies any of these rights, *e. g.*, the right of colored persons to testify, this act gives to the courts of the United States jurisdiction of all causes, civil and criminal, which affect or concern such persons. *Id.*

23. Where a white person commits the crime of burglary, by breaking and entering the house of a colored person, in a state whose laws deny to such colored person the right to testify against the accused, the latter may be indicted, prosecuted, and convicted for such offence in the Courts of the United States. *Id.*

CONTRACT. See CONFEDERATE STATES, 3; CONSTITUTIONAL LAW, 8; CORPORATION, 4, 12, 13; CUSTOM, 1; FRAUDS, STATUTE OF; INTERNATIONAL LAW, 1; PUBLIC WORKS; SALE; VENDOR AND PURCHASER.

1. Where a person employed for a certain term at a fixed salary payable monthly is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due; and the first judgment will not be a bar to another action for salary subsequently coming due. *Huntington v. Ogdenburgh R. R. Co.*, 143.

2. Entire and divisible contracts considered. *Note to Huntington v. Ogdenburgh, &c., R. R. Co.*, 147.

3. Where parties residing at a distance from each other agree to communicate by telegraph in their business transactions, the same rules apply in determining whether a contract has been made as in cases of communications by letter. *Trevor et al. v. Wood et al.*, 215.

4. Therefore, an offer accepted by telegraph constitutes a contract, although the party making the offer attempts to revoke it before his receipt of the acceptance. *Id.*

5. An acceptance by letter of an offer is sufficient to make a contract, not by virtue of being sent through the public mail, but because it is an overt act manifesting the intention of the acceptor, and thus making the *aggregatio mentium* which is the essence of a contract. *Id.*

6. Memorandum made and signed by one party in his private account book not a contract. *Stannard v. Smith*, 831.

7. Party having right to rescind must elect to do so in reasonable time. *Willoughby v. Moulton*, 251.

8. Plaintiff entitled to rescind may recover the money paid, in assumpsit. Tender of money that would have been due on completion of the contract is not essential. *Crossgrove v. Himmelrich*, 312.

9. If part of consideration is void, contract may be good; *aliter* if any part of consideration be *illegal*. *Cobb v. Cowdery*, 572.

10. Promise to perform a legal duty no consideration, *aliter* as to moral duty. *Id.*

11. Services in aiding a party in preparation for trial by disclosing names of witnesses, are good consideration. *Id.*

12. Written lease may be modified by subsequent parol agreement on new consideration, and evidence is admissible to show new contract. *Flanders v. Fay*, 697.

13. Where debt is payable in specific property a new contract made before the debt is due changing the mode and time of payment needs no new consideration. *Thrall v. Mead*, 832.

14. Not to set up business of making shoe cutters in the state, is *illegal*, being in restraint of trade. *Taylor v. Blanchard*, 58.

CONVERSION. See HUSBAND AND WIFE, 22, 29; TROVER.

COPYRIGHT.

1. Under the Act of 1856 an author who has filed a copy of his title-page but not yet published his play, may have an action at law for damages for the representation of his play without his consent. *Bourcicault v. Wood*, 539.

COPYRIGHT.

2. A *resident*, in the meaning of the Copyright Acts, is a person *domiciled* in this country, not a mere sojourner. *Bourcicault v. Wood*, 539.

3. In an action for infringement of copyright in a play, the copyright and the fact of representation being established, the burden is on defendant to show the author's consent to the representation. Mere publication is not permission to perform it. *Id.*

4. A foreigner, resident in this country, who has filed a copy of the title-page of a play, but has not published, is entitled to the protection of the Copyright Laws, but a subsequent publication in a foreign country would be an abandonment of his rights under the Copyright Act of this country. *Id.*

5. If there has been no publication at all by the author of a play, he has a right at common law to damages for the representation of his play from a manuscript obtained without his consent. *Id.*

CORPORATION. See CONSTITUTIONAL LAW, 8; LANDLORD AND TENANT, 3; MUNICIPAL CORPORATION; RAILROAD COMPANY; STAMPS, 2.

1. In a suit by a purchaser of stock against the president of a corporation to recover the value of stock fraudulently over-issued by him, the plaintiff must prove that the certificates purchased by him did not represent genuine stock. *Bruff v. Mali*, 48.

2. The plaintiff having proved that his certificates were issued after the entire stock authorized by law had been taken and certificates issued therefor, the burden was then shifted to the defendants to prove that plaintiff's stock was issued on the surrender or transfer of genuine stock. *Id.*

3. Unless this evidence clearly and indisputably establishes the genuineness of plaintiff's stock, the question should be submitted to the jury. *Id.*

4. The authentication of certificates of stock by the president of a corporation by his signature in the usual mode, is equivalent to a continuing and renewed guarantee to successive purchasers, that the stock is genuine, and the plaintiff is not bound to prove that he purchased his certificate directly from the president or the company. *Id.*

5. The directors of a Railroad Company had power to receive subscriptions for all the untaken stock, and to issue certificates therefor; and the moment this was done the holder became a stockholder, and entitled to a stockholder's rights. *Curry v. Scott et al.*, 166.

6. The law authorizes no distinction between the rights of one stockholder and those of another. If one has not paid his subscription in full he is a debtor for so much of the subscription as remains unpaid, but is none the less a stockholder. *Id.*

7. It is not to be admitted that an old stockholder had a right, to subscribe to the untaken stock, superior to the rights of one who owned no stock. *Id.*

8. An Act of Assembly authorizing the issue of preferred stock did not work a change in the charter until accepted by the stockholders, but when so accepted the directors are authorized to issue the preferred stock. *Id.*

9. The legislature may confer enlarged powers upon the managers of a corporation, with the assent of shareholders; and no one stockholder, by refusing his assent, can hinder the exercise of the enlarged powers. *Id.*

10. Charter forfeited on *quo warranto* and trustee appointed to collect assets and pay debts, surplus belongs to stockholders. *Lum v. Robertson*, 312.

11. Delinquent debtor not allowed to make technical but unmeritorious defence. *Id.*

12. Subscribing to stock of incorporated association creates personal liability to raise the proper proportion of the capital. *Mining Co. v. Lery*, 312.

13. Purchaser from original subscriber being accepted by the corporation there is privity between them. *Id.*

14. In suit under charter of another state the decisions of that state are the best evidence of the rights and duties of stockholders. *Id.*

15. Has capacity at common law to take land in fee. *Page v. Heineberg*, 697.

16. Statutes of mortmain not adopted in Vermont. *Id.*

CORPORATION.

17. Railroad company purchased lands in fee and then abandoned for railroad purposes, the land did not revert. *Page v. Heineberg*, 697.

18. Defendant sued by corporation may deny its legal existence. *Nat. Bk. of Metropolis*, 59.

19. Action by receiver. *Osgood v. Layton*, 252.

20. Civil engineer and travelling agent at fixed salary is servant. *Williamson v. Wadsworth*, 508.

COSTS. See BANKRUPTCY, XI.; EXECUTION, 3.

COUNTER CLAIM. See SET-OFF.

COUNTERFEITING. See COURTS, 1.

COUNTY. See CONSTITUTIONAL LAW, 2, 12-14.

COUNTY BONDS. See COURTS, 5.

COUPON. See BOND, 1, 2.

COURTS. See BANKRUPTCY, II.; CONSTITUTIONAL LAW, 18; EQUITY, 2; MILITARY SERVICE, 1.

1. Passing a counterfeit note of a national bank is an offence for which an indictment will lie in a state court, under the laws of the state. *Jett v. Comm'th.*, 260.

2. There is nothing in the relations of the state and Federal courts, or in the nature of the jurisdiction itself, which makes the jurisdiction of the United States courts to punish the act of passing counterfeit national bank notes, necessarily exclusive, nor is it made so by Act of Congress. *Id.*

3. The concurrent jurisdiction of the national and state courts considered and discussed. *Id.*

4. Have no jurisdiction on a bill in equity by a state to enjoin the Secretary of War from carrying out an Act of Congress, on the ground that such act will destroy the corporate existence of the state. This is a political, not a judicial question. *Georgia v. Stanton*, 441.

5. May issue *mandamus* to county officer to levy tax to pay county bonds, even though a state court has enjoined the officer from so doing. *Riggs v. Johnson Co.*, 572.

6. May enjoin citizens from proceeding in court of another state. *Vail v. Knapp*, 509.

COVENANT. See DEED, 8, 9; EASEMENT, 12; EXECUTOR, 8; MINING LEASE; PARTY-WALL, 1.

CRIMINAL LAW. See INTERNAL REVENUE, 7.

I. *In general.*

1. In a criminal case where insanity is set up as a defence, evidence that a brother of the accused has become insane from a cause similar to that which is claimed to have operated upon the accused, is admissible as having some tendency to prove the hereditary transmission of insane tendencies. *People v. Garbutt*, 554.

2. In criminal cases the burden of proof rests upon the prosecution to establish all the conditions of guilt; and it does not shift to the prisoner where insanity is set up as a defence. The jury are to weigh all the evidence, and unless reasonably satisfied, not only that the prisoner committed the act charged, but also as to his criminal capacity and intent, their duty is to acquit. *Id.*

3. It does not follow, however, that the prosecution are required to put in evidence of sanity before the defence has introduced evidence of the contrary condition. Sanity being the normal condition of humanity, the prosecution may rest upon the presumption that it exists, until evidence to rebut that presumption has been given. *Id.*

4. *Drunkenness* is no legal excuse for the commission of crime. *Id.*

5. Evidence of the good character of a defendant is always admissible in a criminal case, and when put in, the jury have a right to give it such weight as

CRIMINAL LAW.

they think it fairly entitled to. Arbitrary rules for this purpose cannot be laid down for their control. In some cases an unblemished good character may not only raise a doubt as against the clearest case upon the other evidence, but may even bring conviction of innocence. *People v. Garbutt*, 554.

6. Warrant of arrest need only recite the accusation, not the evidence. *Pratt v. Bogardus*, 378.

7. Magistrate is protected in issuing if there is colorable evidence. *Id.*

8. If person is as well known by the name in the indictment as by the one pleaded, the indictment is good. *State v. Dresser*, 445.

9. Where accused does not testify, though allowed by the laws of the state to do so, this fact cannot be used as an argument against him. *State v. Cameron*, 831.

10. On trial of husband for attempt to poison wife, the latter is competent witness. *People v. Northrup*, 636.

II. *Bigamy*. See **HUSBAND AND WIFE**, 2.

III. *Counterfeiting National Bank Notes*. See **COURTS**, 1.

IV. *Larceny*.

11. A building on a market garden, used for storing tools, manure, and seeds, is not a warehouse within the N. H. statute. *State v. Wilson*, 252.

12. Taking several things at one time only one offence. *State v. Cameron*, 831.

13. Evidence on indictment for. *Id.*

CROPPER. See **LANDLORD AND TENANT**, 2.

CURRENCY. See **COIN**.

CURTESY. See **HUSBAND AND WIFE**, II.

CUSTOM. See **COIN**, 1; **INSURANCE**, 2.

1. Requisites of valid custom to affect contracts. *Sipperly v. Stewart*, 639.

2. Of attorneys to give directions to sheriff not admissible to prove that the attorney gave such directions in a particular case. *Hine v. Pomeroy*, 697.

DAM. See **EQUITY**, 9.

Owner may dig canal on his own land to prevent its being flowed by a dam below. *Storm v. Mauchaug Co.*, 126.

DAMAGES. See **COIN**, 2; **COMMON CARRIER**, 17, 18; **MINING LEASE**, 2; **OFFICE**, 7; **RAILROAD**, 15, 18; **VENDOR AND PURCHASER**, 9.

1. While those damages which depend on the sound discretion of a jury are not susceptible of any accurate regulation by the court, yet the jury should be prevented from acting upon improper theories as to the legitimate elements to be considered in estimating them. *Daily Post Co. v. McArthur*, 462.

2. The term "exemplary or vindictive damages," should not be used without such explanation as may prevent a jury from being misled by it. For voluntary wrongs additional damages are allowed for injured feeling, but nothing beyond the individual grievance should be taken in account in estimating them. *Id.*

3. If different agencies have concurred in producing a private grievance, the liability of each person for such portion of the damages as is allowed for injured feeling should be measured by the extent of his own misconduct. *Id.*

4. While the mischief which may be caused by an abuse of the press is such as to render its conductors responsible for great care in guarding against the danger, yet the necessities of civilization require that no unreasonable or vexatious restrictions shall be imposed upon it. *Id.*

5. The character and doings of private persons, not developed in legal proceedings or voluntarily made public, cannot properly be discussed in print; and for all libels, every publisher, whether an individual or a corporation, is responsible to the extent of any special damage, and any estimated damage to credit and reputation. But he is only liable for such damages to injured feeling as must inevitably be inferred from the libel itself, published in a paper of such character and circulation as his, if he has used such precautions as he reasonably could, to prevent such an abuse of his columns. *Id.*

DAMAGES.

6. The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, should exempt a publisher from any aggravation of damages on account of the express malice of his subordinate, for any libel published without his privity or approval. *Daily Post Co. v. McArthur*, 462.

7. But if it should appear that he was wanting in reasonable care to prevent abuses, he would be liable to increased damages for his own misconduct, which might fairly be regarded as identifying him with faults which he took no pains to suppress. *Id.*

8. Vendor interfered with vendee's building by injunction which was afterwards dissolved. Vendee having sold the land was not entitled to recover on the injunction bond damages for difference of cost in building between time when injunction issued and when dissolved. *Morgan v. Negley*, 59.

9. For breach of promise of marriage. *Harrison v. Swift*, 57.

10. For breach of contract to pay is the amount that would have been received. *Wicker v. Hoppuck*, 377.

11. Agreement binding maker in "full and liquidated sum of \$1000, over and above actual damages," &c., is for liquidated damages. *Dwinel v. Brown*, 441.

DEAN, AMOS. 257.

DEBT. See LEGAL TENDER NOTES.

DEBTOR AND CREDITOR. See BANKRUPTCY; DEED, 4; GUARDIAN, 1; MORTGAGE; PARTNERSHIP, 4, 6.

I. *Sale or Conveyance fraudulent as to Creditors.*

1. Other creditors may come in as parties to creditor's bill. *Meyers v. Penn*, 59.

2. Partner in firm about to fail may use his private estate to pay private creditors, and conveyance to private creditor of his real estate is not to be presumed fraudulent. *Bank v. Fitch*, 59.

3. In suit in equity against debtor and debtor's wife to reach property fraudulently conveyed to wife to defraud husband's creditors, plaintiff may take deposition of wife though there has been no service on the husband who is out of the country. *Crompton v. Anthony*, 186.

4. Debtor in failing circumstances cannot even for valuable consideration convey his land reserving a right to occupy it for a time for his own benefit. *Lukins v. Aird*, 313.

5. Conveyance without consideration to defraud creditors void against subsequent as well as prior creditors. *Marston v. Marston*, 443.

6. Purchaser from insolvent debtor with knowledge of intention to defraud particular creditor is liable for such part of the purchase-money as the debtor has diverted from his creditors. *Clements v. Moore*, 378.

II. *Tender and Payment.*

7. Plaintiff having traversed plea of tender cannot except to right to file such plea. *Carpenter v. Welch*, 638.

8. If tender is received although made after the proper time, it operates as a payment as of the proper time. *Id.*

9. Order by debtor to his agent having funds, to pay creditor, is appropriation of the amount. *Goodwin v. Bowden*, 439.

10. Agent's promise to execute the order is an original undertaking. *Id.*

11. Delivery of money by debtor with specific instructions as to its application. Violation of instructions by creditor. *Norton v. Kidder*, 447.

12. Charges of converting security into money are to be deducted before application to payment. *Sheldon v. Raveret*, 379.

13. Especially if creditor is a factor with lien on goods. *Id.*

DEED. See EQUITY, 5-7; ESTATE TAIL; HUSBAND AND WIFE, 12, 25.

I. *Delivery.*

1. Mere recording without knowledge of or delivery to grantee is not legal

DEED.

delivery and subsequent ratification by grantee will not cut out an intervening mortgage for value. *Parmelee v. Simpson*, 60.

2. Delivery to agent of grantor with orders to deliver it presently to grantee passes title at once. *Ernst v. Reed*, 573.

3. Delivery to third person by direction of grantee is sufficient. *Hatch v. Bates*, 442.

4. None but creditor of grantor cannot object to want of consideration. *Id.*

II. *Construction and what passes by.* See **VENDOR**, 11.

5. Construction where premises and *habendum* are repugnant. *Flagg v. Eames*, 573.

6. For lot 120 ft. including stable, &c., not reformed so as to include stable which in fact was on another lot. *White v. Williams*, 187.

7. Reservation of use and occupancy for stated period by grantor not determined by leasing of part unless reservation is strictly personal. *Cooney v. Hayes*, 762.

8. Acceptance by grantee of deed with covenant as to manner of building is equivalent to express covenant by him, and affects the title of his grantees. *Dock Co. v. Leavitt*, 636.

9. Covenant not to erect distillery broken by erection of machinery and building that might be used as such though now used for other purpose. *Id.*

10. For strip of land for private road. *Kilmer v. Wilson*, 379.

11. Sale of lots on street by metes and bounds, according to a plan. *Warren v. Blake*, 442.

12. Timber trees cut down, but lying on the ground, will pass by deed of the land. *Brackett v. Goddard*, 442.

DELIVERY. See **DEED**, 1-3; **ESTATE TAIL**; **FRAUDS, STATUTE OF**, 5; **VENDOR AND PURCHASER**, 15-20.

DESERTER. See **CONSTITUTIONAL LAW**, 9, 10; **MILITARY SERVICE**, 2.

DISTILLERY. See **DEED**, 9; **INTERNAL-REVENUE**, 1-3.

DIVORCE. See **HUSBAND AND WIFE**, I.

DONATIO MORTIS CAUSA. See **HUSBAND AND WIFE**, 36.

DOWER. See **HUSBAND AND WIFE**, II.

DRUNKENNESS. See **CRIMINAL LAW**, 4; **HUSBAND AND WIFE**, 5; **LUNATIC**, 1.

EASEMENT. See **MERGER**; **WAY**.

1. There may be a dedication of land to public use by parol; but the intent to dedicate should in such case be clearly shown. *Morrison v. Marquardt et al.*, 336.

2. The English doctrine that there may be a grant of light and air by implication is not applicable to the situation and condition of this country. *Id.*

3. The English rule is this: If a man sells a house with windows and doors opening on to his vacant ground, neither he nor his grantee can afterwards build upon such vacant ground so as to obstruct the flow of light and air without express reservation of the right to do so: *Held*, that if such a rule should be recognised in this country, it should be applied only in cases where the circumstances make it clear that such must have been the intention of the parties. *Id.*

4. In this case the circumstances negated such intention. *Id.*

5. It is settled law that there is no implied reservation of a right to light and air. So that if one sells vacant land and retains the house adjoining, the purchaser of the vacant land may build thereon, though he darken thereby the windows of the house of his vendor. *Id.*

6. The owner of the servient estate cannot by the unlawful destruction of an easement extinguish the right of the owner of the dominant estate thereto; and the latter owner may, in proper cases, have relief in equity, and not be driven to an action for damages. *Id.*

7. Cannot exist in parol. *Huff v. McCauley*, 63.

EASEMENT.

8. Contract to allow A. to take coal from B.'s land is a *profit a prendre*, and must be created by grant or prescription. *Huff v. McCauley*, 63.

9. Grant of surface right "only for the purpose of a coal-breaker," &c., is an easement only. *Big Mt. Co.'s Appeal*, 313.

10. If owner of adjoining closes, over one of which a way exists for benefit of the other, conveys them simultaneously to different persons, the right of the way does not pass as an easement unless it be of strict necessity. *Warren v. Blake*, 442.

11. Not created or continued by severance of estate unless from necessity. *Fellers v. Humphreys*, 698.

12. Party having easement claimed over his land may interrupt it, and, if sued and damages recovered against him, may sue his grantor on covenant against incumbrances. *Smith v. Sprague*, 573.

ELECTIONS. See OFFICE, 5, 6.

1. Under a statute "to regulate the election of state and county officers," after the polls of an election have been once opened "between the hours of six and ten in the morning" in pursuance thereto, they cannot be "closed" for any purpose until six o'clock in the afternoon, without rendering the election illegal and void. *State v. Ritt*, 88.

2. For what causes an election will be held void. *Note to State v. Ritt*, 91.

EMINENT DOMAIN. See CONSTITUTIONAL LAW, 17-19.**ENGLISH LANGUAGE.** See PARTNERSHIP, 11.

Signs of degrees and minutes not part of. *State v. Jericho*, 762.

ENLISTMENT. See BOUNTY, 1; MILITARY SERVICE.**EQUITY.** See APPRENTICE, 2; BANKRUPTCY, 15; COURTS, 4; DEBTOR AND CREDITOR, 1; EASEMENT, 6; EVIDENCE, 4; EXECUTION, 1; HUSBAND AND WIFE, 16; INTERNATIONAL LAW, 2; NUISANCE, 4-7; SET-OFF.

1. Plain defect of jurisdiction will prevent a decree at any time. *Thompson v. R. R. Co.*, 314.

2. The abolishing by states of the distinction between law and equity will not change the practice of the United States courts. *Id.*

3. Absence of plain and adequate remedy at law the test of jurisdiction. *Watson v. Sutherland*, 61.

4. Answer to bill not complete until filed, and death of party prevents filing. *Giles v. Eaton*, 443.

5. Where a person bought and took possession of a house under a forged deed, the true owner is entitled, on a bill in equity, to have the deed and the record of it declared void, and the deed delivered up to be cancelled, and the purchaser enjoined from assuming to sell the house to any one else. *Bunce v. Gallagher*, 32.

6. It is not necessary that the title of the plaintiff should be established and possession obtained by an action at law. *Id.*

7. The owner having in the trial of his complaint given the forged deed in evidence, is entitled to prove the forgery. *Id.*

8. Where the holder of the legal title is a plaintiff, the misjoinder of other parties having an equitable interest will be disregarded unless the objection be taken by demurrer or answer before answer on the merits. *Id.*

9. Bill lies to ascertain height to which owner of dam is entitled to flow back water. *Carlisle v. Cooper*, 698.

10. Court will not order an issue if evidence is satisfactory. *Id.*

11. Suitor cannot be compelled to elect between suit in equity to prevent future injury and suit pending in law for damages for past, nor will the suit in equity be delayed until the determination of the action at law, which is for a different object. *Id.*

12. Object of preliminary injunction is to preserve the *status quo*, not to transfer property from one to another. *Farmers' Co. v. Reno, &c.*, 121.

13. When court will interfere by injunction with proceedings in a lower court. *Ewing v. St. Louis*, 121.

14. By the chancery practice of Vermont, where an injunction is awarded,

EQUITY.

and the complainant takes out a subpoena returnable to the next term of the court, but neglects to get it served in time, the injunction is not thereby dissolved, but a new subpoena may be issued returnable to the next succeeding term. *Howe v. Eddy*, 219.

15. The respondent may, however, come in at any time, and apply for an order to have the subpoena and bill served on him in order to allow him to answer, or he may move to dissolve the injunction on account of the complainant's delay, or invoke any other action of the court necessary to protect his rights. *Id.*

ESTATE BY ENTIRETIES. See **HUSBAND AND WIFE**, 21.

ESTATE FOR LIFE. See **ESTATE TAIL**.

ESTATE TAIL.

A. made a deed by which he granted certain lands to his daughter B. "during her lifetime, and to her eldest son, which shall be living at her decease, and to his eldest son at his decease, and so on from eldest son to eldest son to the latest generation," *habendum* to B. "and to her heirs as aforesaid." This deed he never delivered, but after his death it was found in his papers and delivered by his administrator to B., who went into possession under it, and afterwards made a deed in fee for the same premises to C., who held by himself and his grantees in fee for thirty-six years. *Held*,

1. That B. took a life estate only.
2. That her eldest son living at her decease took a fee tail directly from the original grantor.
3. That the only title B. took and conveyed and C. took and held under B. was under color of the deed from A., and therefore both B. and C. and the subsequent purchasers under them were estopped from disputing the validity of A.'s deed, because it was not delivered in the lifetime of the grantor.
4. That C. took with notice of the title of B.'s eldest son, and his possession was not adverse so long as B. lived.
5. That the deed from A. to B. being on record, was notice to all subsequent purchasers of the extent of B.'s title. *Ford v. Flint et al.*, 296.

ESTOPPEL. See **ACCOUNT STATED**; **BANKRUPTCY**, 30; **ESTATE TAIL**; **LICENSE**, 1; **RAILROAD**, 17.

Party disclaiming ownership to administrator not estopped by the latter's putting the property in his inventory and having it appraised. *Turner v. Waldo*, 573.

EVIDENCE. See **ACTION**, 2; **ASSUMPSIT**, 1; **CORPORATION**, 1-3, 14; **CRIMINAL LAW**, 1-8; **EQUITY**, 7; **HUSBAND AND WIFE**, 1; **INSURANCE**, 1, 2, 16; **MILITARY SERVICE**, 2; **RAILROAD**, 13-17, 22; **STAMPS**, 3, 4; **WITNESS**.

1. **CONVICTION UPON CIRCUMSTANTIAL EVIDENCE**, 705.
2. If no objection made or exception taken at trial court will not reverse for admission of incompetent. *Voorhis v. Voorhis*, 637.
3. Introduction of evidence not strictly legal to rebut impression produced by other evidence that should not have been admitted. *Lytle v. Bond*, 829.
4. Party may explain how he understood an oath to a bill in chancery. *Whitcher v. Morey*, 187.
5. Copy of minutes of evidence of deceased witness may be read. *Id.*
6. Where date of note is so badly written that the judge cannot read it, evidence is admissible to show the true date, and this is for the jury. *Fenderson v. Owen*, 443.
7. When specimens of handwriting, admitted or proved to be genuine, are offered to prove by comparison the genuineness of the writing in issue, the comparison can only be made by the jury. *Haycock v. Greup*, 529.
8. Such evidence is competent only as corroborative of other proof; it is not admissible as independent proof. *Id.*
9. On an issue to determine the genuineness of a signature of A., specimens

EVIDENCE.

of B.'s writing in which the name of A. occurs are not competent independent evidence to prove by comparison that the signature of A. was written by B. Nor is the opinion of a witness that the signature was not written by A. any foundation for such proof that it was written by B. *Haycock v. Greep*, 529.

10. Whether such testimony would be competent even in corroboration of other testimony that B. had written the signature in issue, doubted. *Id.*

EXECUTION. See HOMESTEAD ; REMAINDER.

1. Goods sold on process and purchaser pays the money to the creditor, sheriff may have bill in equity against creditor for his claim. *Barker v. Barker*, 253.

2. Officer may deduct expenses of keeping and selling goods before applying balance to satisfaction of the execution. *Baldwin v. Hatch*, 446.

3. Officer not bound by taxation of his fees in suit to which he is not party, but *aliter* as to party. *Id.*

EXECUTORS AND ADMINISTRATORS. See ESTOPPEL.

1. An administrator may sue for breach of contract made with his intestate, although the breach occurred after death of the decedent and before grant of letters of administration. *Holcomb v. Roberts*, 474.

2. In cases where it is necessary for the purpose of supporting the rights of the intestate and for the benefit of his estate, letters of administration relate back to the death of the intestate. *Id.*

3. Allowance of claim in another state under ancillary administration not conclusive. *Ela v. Edwards*, 187.

4. Letters testamentary in another state give no authority. *Gilman v. Gilman*, 443.

5. Executor *de son tort*—what he may be allowed. *Tobey v. Miller*, 443.

6. If executor mingles his trust money with his own and dies, no preference will be allowed in the distribution of his estate. *Barlow v. Yeomans*, 637.

7. Court has power to order sufficient assets to be set aside for the discharge of a debt or duty to be paid by testator or his executor at a future day. *Petrie v. Voorhees*, 696.

8. In general bound by all covenants of testator except those to be performed by him in person. *Id.*

EXPRESS COMPANY. See COMMON CARRIER ; REPLEVIN, 4.

FACTOR. See DEBTOR AND CREDITOR, 13.

FALSE REPRESENTATIONS. See VENDOR, 12, 14.

Party liable for not speaking truthfully as to solvency of another, though he might have declined to speak at all. *Viele v. Goss*, 380.

FIXTURES.

1. General rule as to what are. *Hoyle v. R. R. Co.*, 762.

2. Double window frames and blinds not fastened in but held merely by being fitted close are not fixtures. *Peck v. Batchelder*, 637.

FORFEITURE. See INTERNAL REVENUE, 1-3.

FORMER ACTION. See CONTRACT, 1, 2 ; PARTNERSHIP, 2.

FRANCE, TRIBUNALS AND ADMINISTRATION OF JUSTICE IN, 1.

FRAUD. See BANKRUPTCY, III, 34, 42-7, 55, 73 ; DEBTOR AND CREDITOR, I ; MORTGAGE ; TRADEMARK ; VENDOR, 22.

FRAUDS, STATUTE OF. See TRUST, 2, 3 ; VENDOR, 16.

1. Verbal agreement to convey land followed by payment of purchase-money passes no title, nor even license to enter. *Whitcher v. Morey*, 188.

2. Acceptance of bill of goods in a warehouse in another state with order on warehouseman will not take the sale out of the statute. *Boardman v. Spooner*, 188.

3. Name stamped on the bill with a press not sufficient of itself to constitute a memorandum in writing. *Id.*

FRAUDS, STATUTE OF.

4. Receipt by mail, by purchaser, of a bill of goods with terms, &c., will not take the purchase out of the statute. *Pike v. Wieting*, 508.

5. Verbal contract of sale of 1900 bushels of potatoes is taken out of statute by delivery of one load though defendant had previously written to plaintiff not to purchase any more for him. *Danforth v. Walker*, 635.

6. But plaintiff had no right after receiving the letter to purchase more and recover for loss by frost or rot. *Id.*

GOLD. See COIN.**GUARDIAN. See HUSBAND AND WIFE, 23.**

1. Deed to A., his heirs and assigns, with acknowledgment of receipt of the purchase-money from A., guardian, &c., is notice to A.'s creditors that the land is held in trust. *Bancroft v. Consen*, 121.

2. If a guardian wrongfully invest the trust-money in land in his own name, it will not be liable for his debts. *Id.*

GUARANTY. See ARBITRATION, 1; CORPORATION, 4; DEBTOR AND CREDITOR, 10.**HABEAS CORPUS. See BANKRUPTCY, 18; INFANT, 1; MILITARY SERVICE, 1.****HANDWRITING. See BILLS AND NOTES, 2, 10; EVIDENCE, 6-10.****HIGHWAY. See MUNICIPAL CORPORATION, 8-10; NUISANCE, 11; RIVER, 1-3.**

1. Any object in or near a highway which would necessarily obstruct one in its use for the purpose of travelling thereon, or which would be likely to produce that effect, will constitute a defect in the highway. *Hewison v. New Haven*, 777.

2. But those objects which have no necessary connection with the road-bed or relation to the public travel thereon, and the danger from which arises from mere casual proximity and not from the use of the road for the purpose of travelling thereon, will not, as a general rule, render the road defective. *Id.*

3. Where a flag was suspended by private individuals across a public street with iron weights at the lower corners and one of the weights became detached and fell upon a traveller on the highway who was in the exercise of reasonable care, it was held, that the city was not liable for the injury under the duty imposed upon it by law to keep the street "in good and sufficient repair." *Id.*

4. An allegation of duty without stating the facts which raise the duty, is insufficient; and if the facts stated do not raise the duty alleged, the allegation of duty is immaterial. *Id.*

5. An object which is not an obstruction and with which travellers do not come in collision is not a defect, though it be of a nature to frighten horses. *Kingsbury v. Dedham*, 61.

6. Owner of land adjoining may stop drainage of water from highway on to his land. *Franklin v. Fisk*, 61.

7. Pent road is highway, though not an open one. *Walcot v. Whitcomb*, 574.

HOMESTEAD.

Right of redemption not subject to execution when value under \$500. *Tucker v. Kenniston*, 253.

HUSBAND AND WIFE. See NEGLIGENCE, 5; TENANT IN COMMON, 3.**I. Marriage and Divorce.**

1. Marriage is a civil contract not requiring any particular form of solemnization, and may be proved by cohabitation and reputation. *Comm'th. v. Stump*, 61.

2. To constitute the crime of bigamy, there must be a valid marriage subsisting at the time of the second marriage. *McReynolds v. The State*, 796.

3. A marriage between slaves was, in legal contemplation, absolutely void; but if the parties, after their manumission, continued to cohabit together as husband and wife, it was a legal assent and ratification of the marriage; and if while such marriage exists, one of the parties marries another, it is bigamy. *Id.*

HUSBAND AND WIFE.

4. Courts cannot divorce parties not married in the state, nor residents. *Calef v. Calef*, 443.

5. Divorce in Michigan for habitual drunkenness does not extend to case where the same cause existed at marriage. *Porrett v. Porrett*, 189.

6. State prison in the Divorce Act of N. H. means the state prison of that state only. *Martin v. Martin*, 253.

7. Jurisdiction of Supreme Court of New York is entirely statutory, and does not extend to declare a marriage void because one of the parties was previously divorced for a cause that made a second marriage illegal, and went to another state to be married the second time. *Penguet v. Phelps*, 124.

8. Husband's consent bars his action for crim. con. *Bunnell v. Greathead* 313.

9. Negligence on his part goes to reduce damages. *Id.*

II. *Curtesy, Dower and Marriage Settlement.*

10. Married Woman's Act of N. J. has abolished tenancy by curtesy initiate, but not curtesy consummate. *Porch v. Fries*, 699.

11. Tenant by curtesy may not commit waste by cutting timber, and timber severed will retain its character as realty, and heirs may have account for what is taken away and injunction on removal of remainder. *Id.*

12. The Illinois statute giving a married woman exclusive control of her property does not give to her the power of conveying her real estate without the consent of her husband manifested by joining in the deed. *Cole v. Van Riper*, 478.

13. Although the statute abolishes the life estate of the husband in his wife's lands, during their joint lives, it does not abolish the tenancy by the curtesy after the wife's death. *Id.*

14. LIABILITY OF DOWRESS FOR TAXES ASSESSED DURING THE HUSBAND'S LIFE, 385.

15. An ante-nuptial contract between husband and wife, in respect to the disposition and enjoyment of their respective estates, is one in which both parties should exhibit the utmost good faith; and any designed and material concealment ought to avoid the contract at the will of the injured party. *Kline v. Kline*, 713.

16. Marriage settlement conveying property to which wife might become entitled does not pass after acquired property, and equity will not enforce it as an agreement to convey unless such be the plain intent of the parties. *Steinberger v. Potter*, 762.

III. *Separate Estate of Wife and Estate by Entireties.*

17. A trust created before the Act of 1848 to protect a married woman's property from her husband, to determine in case she survives him, is determined by a divorce *a vinculo*. *Koenig v. Smith*, 717.

18. Husband of infant cannot sell growing timber on her land. *Porch v. Fries*, 699.

19. Covenant by husband to stand seised to the use of himself during life and then to the use of his wife during her life, vests the estate in her after his death. *Leavitt v. Leavitt*, 253.

20. The administrator of the husband is not entitled to dispossess the wife by showing a decree of insolvency. The covenant to stand seised may be good notwithstanding, if made in good faith and the husband was not then insolvent. *Id.*

21. Estate by entireties is not destroyed by the Acts of N. Y. allowing married women to hold their property separate. *F. & M. Bank v. Gregory*, 121.

22. Where such estate is voluntarily converted into money it belongs to the husband and becomes liable to his creditors. *Id.*

IV. *Powers of Married Woman.* See *ante*, 12.

23. Power of guardian over infant ceases at marriage. *Porch v. Fries*, 699.

24. Acknowledgment by married infant void. *Id.*

25. A deed of her separate estate without her husband joining, is void. *Dean and Wife v. O'Meara*, 229.

HUSBAND AND WIFE.

26. Married woman may make donation *mortis causa* in Mass. without husband's consent. *Marshall v. Berry*, 121.

27. Married woman liable on her note given for cattle to stock farm for her separate use. *Butchelder v. Sargent*, 253.

V. Actions by and against Husband and Wife. See CRIMINAL LAW, 10; DEBTOR AND CREDITOR, 3.

28. Husband and wife should join in writ of entry for land conveyed to them for their lives. *Wentworth v. Remick*, 254.

29. Suit lies in N. Y. by wife against husband for conversion of her separate estate. *Whitney v. Whitney*, 508.

30. Admissions of marriage by plaintiff evidence to support plea for non-joinder of husband. *Laughlin v. Eaton*, 443.

31. Married woman cannot sue alone though her husband has been away for several years. *Id.*

32. Wife may be compelled to be witness as to matters affecting only her own interests. *Kinney v. Metter*, 699.

INDICTMENT. See CRIMINAL LAW.

INFANT. See HUSBAND AND WIFE, 18, 23, 24.

1. Custody of belongs to father, but court will not of course on *habeas corpus* order them delivered to him. The office of the writ is not to obtain possession of the person, but to free it from illegal restraint. *State v. Baird*, 700.

2. Where children are too young to exercise discretion court will do it for them. *Id.*

INJUNCTION. See EQUITY, 5, 11-15; NUISANCE, 4-8; TRESPASS, 1.

INNKEEPER.

May furnish liquor to his own household as any other head of a family. *State v. Jones*, 189.

INSANITY. See CRIMINAL LAW, 1-3; INSURANCE, 4; LUNATIC; WILL, 1-4;

INSOLVENT. See BANKRUPTCY; DEBTOR AND CREDITOR, I.; HUSBAND AND WIFE, 20; STAMPS, 4; VENDOR, 22.

INSURANCE. See AGENT, 3.

1. In a suit brought in *assumpsit* for breach of a contract between an insurance agent and his company, by which it was agreed that he should receive a percentage on all renewals of policies procured by him as long as such policies remain in force: *Held*, that the action may be sustained as upon a contract indivisible, and testimony will be admitted to show the probable expectancy of the duration of such policies. *Enswoorth v. New York Co.*, 332.

2. A custom among insurance companies as to an agent's property in policies procured by him may be introduced to explain such contract. *Id.*

3. By trustee to whom *cestui que trust* is indebted, for benefit of trustee's creditor. *Ins. Co. v. Chase*, 122.

4. Condition in life policy as to suicide does not include suicide during insanity. *Easterbrook v. Ins. Co.*, 445.

5. Trustees of railroad company insuring all property belonging to said company cover a dredge boat belonging to company attached to wharf at railroad terminus. *Farmers', &c., Co. v. Ins. Co.*, 763.

6. When a steamer is insured, while navigating the Western rivers, there is a warranty implied that the subject insured is a vessel of this description, and will continue so during the existence of the policy. *Baker v. Central Ins. Co.*, 628.

7. If the owners subsequently transfer the machinery and wheels of the boat to another vessel, with the intention to abandon the hull for all purposes of navigation, the hull is no longer at the risk of the underwriter. *Id.*

8. In time policies the mere intention to deviate does not avoid the policy. *Bearns v. Ins. Co.*, 254.

9. Specific and floating policies—division of loss between. *Merrick v. Ins. Co.*, 314.

INSURANCE.

10. Taking by confederate vessel of war was a capture within the warranty of the policy. *Mauran v. Ins. Co.*, 444.
11. Insurers must pay for temporary as well as permanent repairs, where made by their consent and for their benefit. *Alexandre v. Ins. Co.*, 574.
12. Clause that no action shall be maintained without previous reference to arbitration void. *Stephenson v. Ins. Co.*, 444.
13. Construction of policy. *Id.*
14. In case of sale by master from necessity, the salvage belongs to insurers. *Id.*
15. Master's authority rests entirely on necessity, and burden of proof is on the assured. *Id.*
16. Alleged copy of survey not made by order of a Court of Admiralty or under oath not evidence though certified by American consul. *Id.*

INTEREST.

1. Where a sum is left by will in trust, with a direction that the interest and income shall be applied to the use of a person, such person is entitled to the interest from the date of testator's death. *Cook v. Meeker*, 112.
2. Especially is this so where it appears to have been the intent of the testator that the legacy should be paid by a transfer of bonds bearing interest at the time of his death. *Id.*
3. Allowed on unliquidated demands which could be ascertained by computation and reference to established market values. *Sipperly v. Stewart*, 637.
4. In computing with rests the first rest is to be made at end of one year from commencement of account. *Carpenter v. Welsh*, 638.

INTERNAL REVENUE. See STAMP.

1. The words "personal property" in the 48th section of the Internal Revenue Act of 1864, as amended by the Act of 1866, do not include all the personal property found in the same building where the still and illicitly-distilled spirits were found, and in the possession, custody, and control of the same person who had control thereof, but must be confined to the tools, implements, and instruments that had been or could be used in connection with the distillation of spirits in the building. *United States v. Thirty-Three Barrels*, 365.
2. The words "personal property" in section 48 of the Internal Revenue Act, forfeiting property used in illicit distilling, include all the property in the building where the still or spirits are found, whether of a nature to be used in the distillation of spirits or not. *United States v. Quantity of Rags, etc.*, 369.
3. What may be considered within the same building, yard, or enclosure. *Id.*
4. A claimant may take advantage of the limitation of section 68 of the Internal Revenue Act of 1864, under an answer of general denial. *United States v. Six Fermenting Tubs*, 751.
5. The Act of 1866, repealing the 68th section of the Internal Revenue Act, continues the section as to offences against the Revenue Laws committed before the repeal. *Id.*
6. License is only a mode of taxation and does not give any authority to carry on business contrary to the laws of a state. *License Tax Cases*, 123.
7. Such license is no bar to indictment under state law. *Pervess v. Comm'r*, 123.

INTERNATIONAL LAW.

1. During a war contracts between citizens of the opposing belligerents are completely suspended, and cannot be enforced even by a proceeding in *res*. *Connecticut Ins. Co. v. Hall*, 606.
2. Therefore a mortgagee of land in Illinois could not sue out his mortgage while the mortgagor was a citizen of Louisiana, which was in insurrection; and a decree of foreclosure made under such circumstances was opened by a court of equity, although the statutory period for redemption had passed. *Id.*
3. Belligerent cannot blockade mouth of river occupied on one bank by neutrals with right of navigation. *The Peterhoff*, 62.

INTERNATIONAL LAW.

4. Vessel from one neutral port to another does not violate blockade, though the ultimate destination of the cargo be to the enemy. *The Peterhoff*, 62.
5. Articles contraband of war intended for a belligerent are always liable to seizure. *Id.*
6. Classification of goods as contraband. *Id.*
7. Neutral merchant vessel carrying mail is not privileged by that fact from examination, and has a special duty of frankness and respect for belligerent rights. *Id.*

INTOXICATING LIQUORS. See INNKEEPER; VENDOR AND PURCHASER, 21.

JOINDER. See ARBITRATION, 1; EQUITY, 8.

Of complaints for contract and tort in N. Y. *Flynn v. Bailey*, 638.

JOINT DEBTORS. See BILLS AND NOTES, 9.

1. Separate settlement by one need not refer to the statute. *Holdrege v. Bank*, 189.
2. Payment by one under agreement by the other to remain liable does not stop the Statute of Limitations from running in favor of the latter. *Sigler v. Platt*, 189.

JOINT OWNERS. See NEGLIGENCE, 2.

JUDGMENT. See BANKRUPTCY, 13, 14, 20; CONTRACT, 1.

JURY. See NEW TRIAL, 2-4; VERDICT.

LACHES. See ADMIRALTY, 8.

LANDLORD AND TENANT. See BANKRUPTCY, 57-60; MINING LEASE; TROVER, 4.

1. Lessee of land sold under execution against landlord, is not tenant at will to purchaser until notice. *Adams v. McKesson*, 63.
2. One hired to work land and take part of the produce for pay is a cropper, not a tenant. *Id.*
3. Where A. takes lease in trust for corporation to be formed, and corporation receives an assignment of the lease with the knowledge of the facts, it becomes liable for rent. *Van Schick v. R. R. Co.*, 574.
4. Lease for years, with perpetual right of renewal, does not pass fee. *Page v. Esty*, 445.
5. Conveyance by lessor makes grantee landlord, and surrender to original lessor gives him no interest. *Id.*
6. Right of tenant to occupy by himself or assignees, unless restrained by express clause of lease. *Cooney v. Hayes*, 763.
7. Landlord entering peaceably in absence of tenant and on claim of right by expiration of tenancy, tenant cannot forcibly dislodge him. *Sage v. Harpending*, 314.
8. Practice in summary proceedings for removal of tenant in N. Y. *People v. Teed*, 254.

LARCENY. See CRIMINAL LAW, IV.

LEASE. See CONTRACT, 12; LANDLORD AND TENANT; MINING LEASE.

LEGACY. See INTEREST, 1.

LEGAL TENDER NOTES. See COIN, 2.

Railroad fare, even when demanded in advance, is so far a debt that it is payable in legal tender notes. *Lewis v. R. R. Co.*, 511.

LÉGISLATURE. See CONSTITUTIONAL LAW, III.

LETTER. See CONTRACT, 4, 5.

LIBEL. See DAMAGES, 5-7.

1. Where words are susceptible of any innocent interpretation an innuendo is required, as e. g. that a prostitute is under the protection of plaintiff. *More v. Bennett*, 190.
2. Words not actionable are not enlarged by innuendo. "Carry the plaintiff

LIBEL.

back to Thomaston, where he came from," with innuendo that Thomaston meant the state prison, not libellous. *Emery v. Prescott*, 445.

LICENSE. See **INTERNAL REVENUE**, 6, 7; **WAY**, 1.

1. To be irrevocable must be by estoppel, because parties cannot be put in *statu quo*. *Huff v. McCauley*, 63.

2. Mere payment of money for a license will not make it irrevocable. *Id.*

LIEN. See **ADMIRALTY**, 1, 2; **BANKRUPTCY**, 15, 16, 31-33.**LIFE ESTATE.** See **ESTATE TAIL**.**LIMITATIONS.** See **ACCOUNT STATED**; **BANKRUPTCY**, 62-66; **JOINT DEBTORS**, 2.

1. Suit is commenced when the writ is ready with intention of immediate service. *Mason v. Cheney*, 315.

2. How the affixing of a stamp affects the writ. *Id.*

3. Partial payment appropriated to whole account will stop the statute. *Dyer v. Walker*, 445.

4. Where debt is payable on demand statute does not usually begin to run until demand, but creditor by unreasonable delay may put the statute in operation without demand. *Thrall v. Mead*, 832.

LIQUIDATED DAMAGES. See **DAMAGES**, 11; **MINING LEASE**, 2.**LUNATIC.** See **WILL**, 1-4.

1. Inquisition changes the presumption in favor of sanity, and casts onus on party setting up a contract, but mere proof of habitual intemperance apart from finding by inquisition is not enough for that purpose. *Noel v. Karper*, 123.

2. Chancery will grant second inquisition if ground is laid. *Matter of Collins*, 700.

3. Imbecility for which commission will issue must amount to unsoundness of mind, and there is no presumption against the mind of a person one hundred years of age. *Id.*

MAIL. See **CONTRACT**, 5; **INTERNATIONAL LAW**, 7.**MANDAMUS.** See **COURTS**, 5.

1. Granting or refusing is discretionary. *People v. Croton Aqueduct Board*, 509.

2. Matter of discretion. Party asking must have a right not only to a decision but to the thing claimed. *People v. Booth*, 315.

3. Where title of drawee of city warrant to the money is disputed, mayor cannot be compelled by *mandamus* to sign the warrant. *Id.*

4. If return be sufficient in law though false in fact, a peremptory writ will be refused until the return be falsified by action. *Dane v. Derby*, 190.

5. Practice concerning. *Id.*

MAP. See **DEED**, 11; **MUNICIPAL CORPORATION**, 9.**MARITIME LIEN.** See **ADMIRALTY**, 1, 2.**MARK.** See **BILLS AND NOTES**, 2.**MARRIAGE.** See **HUSBAND AND WIFE**, I.**MARRIAGE SETTLEMENT.** See **HUSBAND AND WIFE**, 15, 16.**MASTER AND SERVANT.** See **RAILROAD**, 14-19.

1. Constructive service—remedy of servant discharged before end of his engagement. *Note to Huntington v. Ogdensburgh R. R. Co.*, 147.

2. Master not liable for injury from negligence of fellow servant though of a different grade and engaged in different kind of work if both were at work on different parts of same general purpose. *Faulkner v. R. R. Co.*, 509.

MATERIAL-MEN AND THEIR LIENS, 513.

MERGER.

Where title to two adjoining closes unites, all subordinate rights and easements are extinguished. *Warren v. Blake*, 442.

MILITARY SERVICE. See BOUNTY, 1; TAXATION, 2.

1. Congress has power to prohibit state judges from interfering with enlistments by *habeas corpus*, and the acts of 1862 and 1864 have assumed exclusive jurisdiction on this subject. *Matter of O'Conner*, 60.

2. Enlistment and desertion may be proved otherwise than by record—custom of substitute brokers—town quota. *Lebanon v. Heath*, 315.

3. Money paid to broker for substitute who proved to be a deserter, may be recovered in action for money had. *Id.*

MINING LEASE.

1. Covenants to pay rent for coal taken out and to take out certain quantity. Separate covenants as to contiguous mines. *Powell v. Burroughs*, 315.

2. Damages for breach of such covenant. Uncertainty of extent of injury a criterion in distinguishing between penalty and liquidated damages. *Id.*

MISNOMER. See CRIMINAL LAW, 8.

MISREPRESENTATION. See FALSE REPRESENTATION.

MORTGAGE. See BOND, 1, 2; DEED, 1; INTERNATIONAL LAW, 2; STAMPS, 8-10.

Separate defeasance withheld from record to defraud creditors is valid and will be enforced between parties. *Clark v. Condit*, 763.

MORTMAIN. See CORPORATION, 16.

MUNICIPAL BONDS. See COURTS, 5; MUNICIPAL CORPORATION.

MUNICIPAL CORPORATION. See HIGHWAY, 1-5; MANDAMUS, 3.

1. The power of a municipal corporation to borrow money is entirely distinct from those powers bestowed upon it for public purposes, and pertaining to its functions as a local government, exercising a part of the sovereignty of the state. *De Voss v. City of Richmond*, 589.

2. In the exercise of a power to borrow money, a municipal corporation, *quoad hoc*, is to be treated as a private person or an ordinary trading corporation, and will be held to the same degree of responsibility for the acts of its officers and agents. *Id.*

3. Where a city issues its registered bonds, and invites the public to deal upon the faith of them as the ultimate evidence of title, it cannot be heard to gainsay their validity in the hands of a *bond fide* holder, although in the issuing of the bonds the agents of the city violated their instructions. *Id.*

4. Therefore the city of Richmond was estopped to deny the validity of a registered bond regularly transferred and in the hands of a *bond fide* purchaser, even though such bond was issued by its transfer officer in disregard of instructions to make a certain recital on the face of the bond, which if made would have notified the purchaser of the facts creating the alleged invalidity. and this because, by its ordinances, the city had declared that the delivery of a registered bond, with a power of transfer, should operate to pass the complete title, both at law and in equity, to a *bond fide* purchaser; saying, that all payments by the city to the registered owner should be deemed valid. *Id.*

5. Where a city charter required that all work should be let by contract to the lowest bidder, *held*, that the city authorities could not contract at all for laying the Nicholson pavement, the right to lay it being a patented right and owned by a single firm, and, therefore, the work being one which could not be open to competition. *Dean v. Charlton*, 564.

6. The fact that an article is patented, does not necessarily prevent any person but the patentee from contracting to supply it; others may do so, taking the risk of being able to obtain the patentee's license. *Hobart v. Detroit*, 741.

7. Therefore, where a city charter provides that no contracts shall be made by the city, except with the lowest bidder, after advertisement of proposals, it does not prevent the city from contracting for a patented article, such as the

MUNICIPAL CORPORATION.

Nicholson pavement, although in point of fact the only bidder was the patentee, who held a monopoly of the article. *Hobart v. Detroit*, 741.

8. Report of commissioners on altering street. *People v. Brooklyn*, 317.

9. Owner who lays out land in streets, and sells lots by a map publicly exhibited, dedicates the streets to the public, but they do not become public highways until accepted by the corporation. *Pope v. Union*, 701.

10. Discretion as to acceptance of streets is exclusively for the corporation. *Id.*

NAME. See **CRIMINAL LAW**, 8.

NAVIGABLE STREAM. See **RIVER**.

NAVY. See **MILITARY SERVICE**, 1.

NE EXEAT.

1. Will be issued only for an equitable demand for a certain sum actually due, or for an account where some sum is due. *MacDonough v. Gaynor*, 701.

2. Practice in regard to. *Id.*

NEGLIGENCE. See **ADMIRALTY**, 4-7; **BAILMENT**, 4; **COMMON CARRIER; MASTER AND SERVANT**, 2; **RAILROAD**.

1. The owner is liable for injury done by an animal which is known to be fierce or dangerous, though it does not belong to a class *feræ naturæ*. *Oakes v. Spaulding*, 551.

2. Where such an animal is the joint property of two persons, one of whom allows the other to have charge of it, both are liable to a person injured. *Id.*

3. Railroad company allowing another company to use its road is liable for accidents to its own passengers from the other company's negligence. *R. R. Co. v. Barron*, 124.

4. Damages for death depend very much on the facts of the particular case. It is not necessary that the next of kin entitled to damages should have been entitled to support by the decedent. *Id.*

5. Husband may sue for death of wife. Measure of damages. *Hyatt v. Adams*, 191.

6. Peculiarly a question of fact. *Woodin v. Austin*, 763.

NEGROES. See **CONSTITUTIONAL LAW**, X.

NEW TRIAL.

1. For after-discovered evidence. *Ordway v. Haynes*, 316.

2. Conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party, and listened to by the jurors without understanding that they were guilty of misconduct in so doing. *McDaniels v. McDaniels*, 729.

3. A motion for a new trial, upon the ground of misconduct by jurors during the trial, need not contain an averment that the misconduct was unknown to the moving party before the jury retired. It would seem to be otherwise when the objection to the juror is some matter which existed before the trial commenced, and which might have been a cause for challenge. *Id.*

4. The fact that the moving party neglected to inform the court, before the jury retired, of misconduct on the part of jurors during the trial which came to his knowledge, would not, if proved, necessarily, as a matter of law, defeat the motion for a new trial, but would be one circumstance to be considered with others by the court in determining whether, in their discretion, to set aside the verdict. *Id.*

NICHOLSON PAVEMENT. See **MUNICIPAL CORPORATION**, 5-7.

NOTICE. See **BROKER**, 2-5; **COMMON CARRIER**, 1, 7, 10; **ESTATE TAIL; GUARDIAN**, 1; **PARTNERSHIP**, 6; **RAILROAD**, 25; **VENDOR**, 11.

NUISANCE. See RAILROAD, 24; TRESPASS, 1.

1. A tomb upon one's own land, is not necessarily a nuisance, but it may become such from locality and other facts. *Barnes v. Hathorn*, 81.

2. Plaintiff proved that defendant's tomb, erected within forty-four feet of the former's dwelling-house, contained, in 1856, nine dead bodies, from which was emitted such an effluvium as to render his house unwholesome; that, after an examination by physicians, the bodies were removed; that the tomb remained unoccupied thereafterwards, until 1865, when another body was therein interred; that the plaintiff's life was made uncomfortable while occupying his dwelling-house, by the apprehension of danger arising from the use of said tomb; and, that the erection and occupation of said tomb had materially lessened the market value of his premises. In an action for damages on the foregoing facts: *Held*, a nonsuit was improperly ordered. *Id.*

3. Cases on the subject of nuisance collected. *Note to Barnes v. Hathorn*, 86.

4. Where a particular kind of fuel, the use of which is productive of injury to the owners of neighboring property, is necessary in the course of a manufacture in which the parties using it are largely engaged, and whose products the public require; and the process of manufacture and fuel used are generally employed in similar establishments, and there is neither a wilful or negligent infliction of injury, equity will not enjoin against the use of such fuel; but will leave the party complaining to his action at law for damages. *Richards v. Phenix Iron Co.*, 356.

5. *Semble*, that if the use of such fuel in the particular manufacture were unnecessary, and other fuel was equally good and available, or that by a reasonable expenditure of money in the manufacturing works all injury might be avoided, equity would enjoin against it as a nuisance, where injury was inflicted upon neighboring property. *Id.*

6. The objection to a factory or other building in a city that it will prevent the use of the neighboring ground for such buildings as would, in the ordinary course of affairs and the extension of the city, be erected there, is not a ground for interference by a court of equity. The subject presented by such objection is one of public policy, not of private right, with which courts deal. *Rhodes v. Dunbar*, 412.

7. A court of equity will not interfere with a particular use of a building or lot of ground unless it amounts to a nuisance at law for which damages might be recovered, and for which damages merely would not be an adequate remedy. *Id.*

8. Mere diminution of value of surrounding property is not a ground for injunction. *Id.*

9. Smoke, noise, and liability to fire as elements of nuisance in a city. *Id.*

10. Noise and jar of machinery may be nuisance to dwelling-house or inn, but evidence that guests declared they left the inn on that account is not admissible. *Wesson v. Iron Co.*, 125.

11. Person making excavation in highway liable for injuries resulting. *Portland v. Richardson*, 446.

12. If an injury to property of an individual he may sue for it though others are injured in like manner. *King v. R. R. Co.*, 764.

OFFICE AND OFFICER. See BANK, 2; EXECUTION, 2, 3.

1. The term for which the incumbent of an office, whose duration was limited by law, had been appointed by the President with the concurrence of the Senate, expired when the Senate was in session. No appointment in which the Senate concurred was made at that session, and the President, in the ensuing recess, appointed another person to the office by a commission to expire at the end of the next session of the Senate. It seems that the former incumbent's term was not extended by the Tenure of Office Act of March 2d, 1867; and that as he had been appointed before that Act, Congress could not constitutionally have prolonged by it his official tenure without a new appointment by the President and concurrence of the Senate, as to the additional period. *Case of the District Attorney*, 786.

2. It seems also that the commission of the subsequent appointee was of no

OFFICE AND OFFICER.

effect, the vacancy not having *happened* during a recess of the Senate, and the President therefore having no constitutional power to make a temporary appointment. *Case of the District Attorney*, 786.

3. Office is public station or employment conferred by government, and embraces the ideas of tenure, duration, emolument and duties. *U. S. v. Hartwell*, 446.

4. Officer under Sub-Treasury Act of Aug. 6, 1846. *Id.*

5. A tribunal authorized by law to decide upon the sufficiency of sureties for official duty, cannot postpone its decision because the title to the office is elsewhere disputed. *Commonwealth ex rel. Ballier v. Common Council of Philadelphia*, 362.

6. An officer not commissioned is authorized to enter upon the performance of the duties upon the certificate of election delivered by the return judges. *Id.*

7. Contested right—ouster on *quo warranto* and *supersedeas* by writ of error, salary is measure of damages in suit on bond. *U. S. v. Addison*, 575.

OHIO. See RIVER, 1.

PARENT AND CHILD. See INFANT.

Rule requiring express promise to pay for child's services after coming of age applies to adopted child. *Lunay v. Vantine*, 764.

PARTITION.

1. By parol is invalid, notwithstanding boundaries marked and several occupation of the purparts for less than twenty years. *Ballou v. Hall*, 255.

2. Complainant must show title and if disputed must establish it by action at law. *Hay v. Estell*, 702.

3. A sale under a writ of partition is a judicial sale, and discharges the lien of judgments and of a mortgage by one of the tenants in common of his undivided portion. *F. & M. Bank v. Girard Ins. Co.*, 467.

4. Such mortgage is discharged in Pennsylvania although it be a first mortgage and have priority of all other liens. The Acts of 1830 and 1845 only preserve the lien of such mortgage from discharge by sale under a writ of execution. *Id.*

5. What irregularities in the proceeding for partition will not vitiate it. *Id.*

PARTNERSHIP. See BANKRUPTCY, 48, 68-75; DEBTOR AND CREDITOR, 2; JOINT DEBTORS.

1. A note given by partners is not a joint and several obligation in a technical sense, though it has some of the qualities of a several obligation. *Mason v. Eldred*, 402.

2. Therefore a judgment upon a partnership note against one of the makers is at common law a bar to a subsequent suit against the other partner who had not been served with process in the first suit. *Id.*

3. But in Michigan the rule is otherwise by statute. *Id.*

4. Note in fact for partnership debt, but signed by one partner only, is good against all as between themselves. *Sprague v. Ainsworth*, 575.

5. Purchase by one partner of another's interest, with bond to indemnify. *Bunton v. Dunn*, 447.

6. Retiring partner liable to creditor of the firm, unless the latter had notice or was put on inquiry. What amounts to notice. *Zollar v. Janerin*, 252.

7. Failure of one to pay in his proportion of the capital does not authorize others to exclude him from the partnership. *Hartman v. Woehr*, 765.

8. Articles providing for continuance of partnership during continuance of lease, renewable at option of one partner, he is not bound to renew. *Phillips v. Reeder*, 765.

9. On dissolution, majority have no right to dispose of another's share without his consent, or to compel him to sell or divide, except by judicial proceedings. *Id.*

10. Partner has no authority to submit partnership matter to arbitration so as to bind the firm. *St. Martin v. Thrasher*, 764.

11. Presence of partner, who understood English imperfectly, at conversa-

PARTNERSHIP.

tion resulting in submission of partnership matter to arbitration, not conclusive of his assent. *St. Martin v. Thrasher*, 764.

PARTY-WALLS.

1. An agreement between adjoining owners of a town lot, A. and B., that A. might build a party-wall equally upon the land of both, and that whenever B. should build upon his lot so as to use the wall, he would pay one-half of the cost thereof, is not a covenant running with the land so as to entitle C., who had purchased A.'s lot, upon the performance of the condition as to the rise of the wall, to sue B. for the money. *Block v. Isham*, 8.

2. Early English laws concerning. Principles applicable to. *Note to Block v. Isham*, 10.

PATENT. See MUNICIPAL CORPORATION, 5-7.

PATENTING A PRINCIPLE, 129.

PAYMENT. See DEBTOR AND CREDITOR, II.

PENALTY. See DAMAGES, 11; MINING LEASE, 2.

PENSION AGENT. See BOUNTY, 2.

PENT ROAD. See HIGHWAY, 7.

PLAN. See DEED, 11; MUNICIPAL CORPORATION, 9.

PLEADING. See ACTION, 2; ARBITRATION, 1; HIGHWAY, 4; TRESPASS, 2, 3; TROVER, 3.

1. Payment is an affirmative plea. *Kendall v. Brownson*, 316.

2. Plea of covenants performed *absque hoc* is a negative plea, and gives plaintiff the conclusion to the jury. *Smith v. Frazier*, 125.

PROMISSORY NOTE. See BILLS AND NOTES.

PUBLIC LANDING. See RIVER, 3-7.

PUBLIC WORKS. See ASSUMPSIT, 3; CONSTITUTIONAL LAW, 11.

Advertisement inviting proposals to bid for construction of works does not create any obligation to award a contract. *People v. Croton Aqueduct Board*, 509.

RAILROAD. See COMMON CARRIER; CONSTITUTIONAL LAW, 6; CORPORATION; INSURANCE, 5; LEGAL TENDER NOTES; NEGLIGENCE, 3-6.

1. LIABILITY FOR NEGLIGENCE, 449.

2. RAILWAY MANAGEMENT AND RESPONSIBILITY, 577.

3. Where a passenger on a railway train is injured by the misconduct of a fellow-passenger, the company is liable only in case there was negligence in its officers in not making proper efforts to prevent the injury. *Pittsburgh, &c., Railway Co. v. Hinds and Wife*, 14.

4. Railroad companies are bound to furnish men enough for the ordinary demands of transportation, but not a police force adequate to extraordinary emergencies,—as to quell mobs by the wayside. *Id.*

4. It is negligence in a conductor to voluntarily admit improper persons or undue numbers into the cars. *Id.*

6. Where the evidence shows that an excited crowd, at a way-station, among whom were drunken and disorderly persons, rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, it is error in the court to submit that to the jury from which they may find negligence in the conductor in admitting in the cars either improper persons or undue numbers. *Id.*

7. In case of fighting or disorder in the cars the conductor must at once do all he can to quell it. If necessary, he should stop the train, call to his aid the engineer, firemen, all the brakemen and willing passengers, lead the way himself and expel the offenders, or demonstrate by an earnest experiment, that the undertaking is impossible. *Id.*

8. It is negligence for a passenger on a railroad train to put his arm out of the car window, and if the facts are undisputed that the injury resulted from

RAILROAD.

this cause, the Court should pronounce it negligence as a matter of law. *Pittsburgh & Connellsville R. R. Co. v. McClurg*, 277.

9. There may be qualifying circumstances in the condition of the passenger which would make special care the duty of the carrier, but such facts should be proved as part of the case. *Id.*

10. The case of the *New Jersey Railroad Co. v. Kennard*, 9 Harris 203, so far as it decided that it is the duty of railroad companies to place guards on their car windows so as to prevent passengers from putting their limbs out, overruled. *Id.*

11. It is negligence for a passenger in a railroad car to allow his arm to project out of the window, and if he receive injury from such position he cannot recover. *Indianapolis and Cincinnati R. R. Co. v. Rutherford*, 476.

12. The railroad company is not bound to put bars across its windows to prevent passengers from putting their limbs out. *Id.*

13. In an action against a railroad company for injury caused by an accident, evidence that the conductor was intemperate or otherwise incompetent is admissible to raise a presumption of negligence. *Pennsylvania R. R. Co. v. Books*, 524.

14. Admissions or declarations of the employees of the company, made subsequently to the accident, are not competent evidence. Such declarations are only competent as part of the *res gestæ*; and the declarations of an officer of the company stand upon the same footing. *Id.*

15. In an action for damages by a person injured by negligence, evidence of the number of plaintiff's family or of his habits and industry is not admissible unless special damage is averred. *Id.*

16. It is no justification for the employment of an incompetent servant that competent ones were difficult to obtain. *Id.*

17. Where a person injured by a railroad accident had accepted a ticket or pass describing him as "route agent, an employee of the Railroad Co.," this pass is competent evidence for the company, but it does not estop the plaintiff from showing that he was not, in fact, an employee of the company. *Id.*

18. In an action for injury by negligence the damages should be compensation for the actual injury, and it is error to leave the measure and amount of damages, as well as the rules by which they are to be estimated, entirely to the jury. *Id.*

19. Not liable to employee injured by falling of bridge from defect not perceptible to competent engineer. *Faulkner v. R. R. Co.*, 510.

20. Agent in charge of depot and freight is proper person of whom to inquire of lost baggage, and his answer is part of *res gestæ*. *Curtis v. R. R.*, 125.

21. If passenger at end of his journey leaves his baggage without any arrangement, the company is not liable, but an arrangement with the baggage-master to take charge of it will bind the company. *Id.*

22. Evidence that passenger is lame and unable to take personal charge of baggage is admissible to rebut the presumption of negligence from his leaving it. *Id.*

23. Wood, timber, &c., distributed along the line for present use are part of it for purposes of taxation. *R. R. Co. v. Prescott*, 255.

24. Railroad company bound to operate its road so as to cause the least danger to buildings on the line, and the fact that the building was erected after the road does not alter the case. *King v. R. R. Co.*, 764.

25. Must receive goods as a common carrier, but may make special contract. Acceptance of bill of lading with conditions, is an agreement to the conditions. *McMillan v. R. R. Co.*, 191.

26. Interference with rights in property and restoration to same condition again. *Arnold v. R. R. Co.*, 380.

REAL ESTATE. See DEED, 12; HUSBAND AND WIFE, 11, 22; VENDOR, I.

1. Surplus of proceeds of decedent's lands sold to pay debts remains realty. *Oberle v. Lerch*, 765.

2. Law of state where lands lie will determine the question of real or personal estate, though owner be resident of another state. *Id.*

RECEIVER. See CORPORATION, 19.

Signing bond to, is an admission not only of obligee's character as receiver, but of the right to sue. *Scott v. Duncombe*, 381.

RECORDING ACTS. See DEED, 1; STAMPS, 9.

REMAINDER.

Liable to execution if vested. *Nichols v. Levy*, 120.

RENT. See BANKRUPTCY, 57-60; LANDLORD AND TENANT; REPLEVIN.

REPLEVIN.

1. In avowry in replevin for rent in arrear, the rent reserved must be accurately stated; rent in arrear need not be. *Phipps v. Boyd*, 316.

2. Averments and evidence in such case. *Id.*

3. Action on replevin bond. *Tuck v. Moses*, 447.

4. Lies against express company after tender of legal charges. *Evelath v. Blossom*, 447.

5. Lies only against person having possession or control of goods. *Ramsdell v. Buswell*, 447.

6. Property bond. Death of plaintiff. Liability of defendant. *Emerson v. Booth*, 766.

REVENUE ACTS. See INTERNAL REVENUE.

REVERTER. See CORPORATION, 17.

RIPARIAN OWNER. See CONSTITUTIONAL LAW, 3; RIVER; TIDE WATERS.

RIVER. See CONSTITUTIONAL LAW, 5; TIDE WATERS.

1. The Ohio river being a great navigable highway between states, the public have all the rights that by law appertain to navigable streams, as against riparian owners; but the public rights are upon the river, not upon the banks. *Bainbridge v. Sherlock*, 720.

2. The title of the riparian owner extends to low-water mark. *Id.*

3. The right to use the river as a highway does not imply the right to use the banks for the purposes of landing, to receive and discharge freight and passengers. Except in cases of peril or emergency, the navigator has no legal right to land, without consent of the riparian owner, at places other than those that have in some way become public landing-places. *Id.*

4. Riparian owners may extend wharves to, and into the navigable portion of, the river, provided they do not unnecessarily obstruct navigation. *Id.*

5. Whoever would maintain a wharf for the accommodation of any particular class of vessels, should possess a sufficient water-front to contain that class of vessels, without obstructing access to the lands of contiguous proprietors. *Id.*

6. A wharf-boat moored to the shore, is entitled to the same immunity from trespass, or obstruction by vessels navigating the river, as is the land itself to which the wharf-boat is moored. *Id.*

7. The navigator landing at one wharf with permission of the wharfinger, is not justified by any public right in the river, in so landing and mooring his vessel, as that while landed its side and stern will be carried by the current against the wharf-boat of a contiguous wharfinger lower down the river, thereby obstructing access to the lower wharf. *Id.*

8. Owner of land no right to corrupt stream. *Merrifield v. Lombard*, 126.

SALE. See BAILMENT, 1; FRAUDS, STATUTE OF; TROVER, 1; TRUST, 3; VENDOR.

1. Of all tools, &c., on a farm—parol evidence admissible to explain what specific property included. *Rugg v. Hale*, 638.

2. Incorrect description of locality of personal property sold does not affect the sale. *Id.*

SALVAGE. See INSURANCE, 14.

SECESSION. See CONFEDERATE STATES.

SECURITY. See BILLS AND NOTES, 12.

SERVANT. See CONTRACT, 1, 2; CORPORATION, 20; MASTER AND SERVANT; RAILROAD, 16.

SERVICE. See ATTORNEY, 7.

SET-OFF.

Equitable claim may be set off against one purely legal. *R. R. Co. v. R. R. Co.*, 186.

SHERIFF. See EXECUTION, 1.

SHIPPING. See ADMIRALTY; INSURANCE, 14-16.

1. Place where services are in fact rendered is place where debt is contracted within the N. Y. statute for collecting debts against vessels. *Mullin v. Hicks*, 511.

2. Master running vessel on shares is not owner nor charterer, but has the ordinary powers of a master. *McCready v. Thorne*, 576.

3. Sale of vessel by master in a distant port—requisites to validity, and effect of. *The Amelie*, 317.

4. Vessel cannot have permanent and temporary registry at same time. *Chadwick v. Baker*, 192.

5. Under Act of July 29, 1850, bill of sale must be recorded in office from which the last register issued. *Id.*

SIGNATURE. See BILLS AND NOTES, 2; EVIDENCE, 9.

SLAVE. See CONSTITUTIONAL LAW, X.; HUSBAND AND WIFE, 3.

SPECIFIC PERFORMANCE. See VENDOR, 5.

STAMPS. See BILLS AND NOTES, 5; LIMITATIONS, 2.

1. By the Act of Congress of 1864, receipts for goods delivered to a common carrier for transportation, being in effect inland bills of lading, were not subject to stamp duty. *United States v. Baltimore and Ohio R. R. Co.*, 757.

2. A corporation is liable to indictment for the act of its officer or employee, in issuing papers which the law requires to be stamped, without the proper stamps, with intent to evade the provisions of the Act of Congress. *Id.*

3. Innocent omission to stamp a note does not make it inadmissible in evidence. *Tobey v. Chipman*, 64.

4. An insolvent's bond is in legal proceedings and need not be stamped. *McGovern v. Hosback*, 64.

5. Voluntary bond unstamped not void, unless omission was to evade the Act of Congress. *Id.*

6. Under the Act of 1864 a summons from a justice where the amount claimed is over \$100, requires a stamp. *Cole v. Bell*, 255.

7. Want of stamp being a question affecting jurisdiction, is not waived by omission to specify it as a ground of error. *Id.*

8. Chattel mortgages not within the provision of the Act authorizing stamping of mortgages by collector, when stamps omitted without intent to evade the law. *Vail v. Knapp*, 511.

9. Such mortgages in N. Y. are merely filed not recorded. *Id.*

10. Not necessary on mortgage to secure contingent liabilities. *Id.*

STATUTE.

1. Penal statute may receive full meaning of the words, or even the more extensive of two meanings. *U. S. v. Hartwell*, 446.

2. To be construed by the meaning as expressed to those who are to be governed by it. Legislator's intent not to be declared by himself. *Steamboat Co. v. Transportation Co.*, 766.

STOCK. See BROKER, 2-5; CORPORATION.

STOPPAGE IN TRANSITU. See VENDOR, 19-21.

STREAM. See RIVER; TIDE WATERS.

STREET. See DEED, 11; MUNICIPAL CORPORATION, 8-10.

SUBSTITUTE BROKER. See MILITARY SERVICE, 2, 3.

SUNDAY. See **COMMON CARRIER**, 16

1. Secular labor of any kind is violation of law, and a disturbance of others if done in their presence even with their consent. *George v. George*, 319.
2. Execution of will not labor within the statute. *Id.*

SURETY.

1. Where the principals and three sureties signed a promissory note, after which, and before delivery, by an arrangement between the principals and the surety who *first* signed the note, his name was erased therefrom without the knowledge or consent of the other sureties; and the note was then delivered to the payee in a condition which showed upon its face that the name of the surety who *first* signed the same had been erased; whereupon the note was received with knowledge of the relation of principal and surety existing between the makers: it was *held*: 1st. That the discharge of the surety released the co-sureties who signed the note when his name was upon it. 2d. That the payee received the note under circumstances which would put a reasonably prudent man upon inquiry; and was charged with knowledge of the rights of the co-sureties. It was also *held*, that if the makers of the note were all principals the erasure of the name of one would be a discharge of the others only *pro tanto*. *McCramer v. Thompson et al.*, 92.
2. To make negligence of creditor that will exonerate surety the request must be to collect the debt by process of law; a request to *push* the debtor is not enough unless that term meant and was understood by the creditor to mean by process of law. *Singer v. Troutman*, 126.
3. Indulgence of principal by creditor with consent of surety does not discharge the latter, and consent is a question for the jury. *Treat v. Smith*, 447.

TAXATION. See **CONSTITUTIONAL LAW**, 8; **HUSBAND AND WIFE**, 14; **INTERNAL REVENUE**, 6; **RAILROAD COMPANY**, 23.

1. Where the owner of an unseated tract, lying partly in county S., procures a survey, and returns to the county commissioners for taxation a description of the land as 55 acres lying in S. county, part of a tract containing 349 acres, the residue lying in N. county, with the warrantee's name, and it is so assessed, and the taxes are paid for two years, and in the following year the assessment is so changed in name and quantity that the owner, seeking to pay the taxes, is unable to ascertain that the tract is taxed, and therefore does not pay the tax, a sale for such taxes does not pass the owner's title. *Brettaugh v. Locust Mountain Coal Co.*, 109.
2. Exemption on account of military service is a personal privilege not extending to wife's property. *Crawford v. Burrell Township*, 126.
3. Act legitimating children of testator after devise to them has vested, does not relieve from collateral inheritance tax. *Comm'th v. Stump*, 61.
4. Vote to sustain a school—effect of such vote not to be enlarged by intention of voters. *Adams v. Crowell*, 576.
5. S. C. of N. Y. will not use its equity powers to stay assessment and collection of a tax. *Messeck v. Supervisors*, 637.

TELEGRAPH. See **COMMON CARRIER**; **CONTRACT**, 3.

1. Telegraph companies, in the absence of any provision of the statute, are not common carriers, and their obligations and liabilities are not to be measured by the same rules, but must be fixed by considerations growing out of the nature of the business in which they are engaged. They do not become insurers against errors in the transmission of messages, except so far as by their rules and regulations, or by contract, they choose to assume that position. *Western Union Telegraph Co. v. Carew*, 18.
2. When a person writes a message under a printed notice, requesting the company to send such message according to the conditions of such notice, *held*, that the printed blank was a general proposition to all persons of the terms and conditions upon which messages would be sent, and that by writing said message and delivering it to the company, the party must be held as accepting the proposition, and that such act becomes a contract upon those terms and conditions. *Id.*

TELEGRAPH.

3. Where a telegraph company established regulations to the effect that it would not be responsible for errors or delay in the transmission of unrepeatd messages, and further, that it would assume no liability for any error or neglect committed by any other company over whose lines a message might be sent in the course of its destination, *held*, that such regulations were reasonable and binding on those dealing with the company. *Western Union Telegraph Co. v. Carew*, 18.

4. May limit liability by rules as to repetition of messages, and writing message on company's blank, with printed conditions, will be evidence of notice of such rules. *Ellis v. Tel. Co.*, 127.

TENANT IN COMMON.

1. Cannot maintain trover against co-tenant for taking all the crops. *Bal-lou v. Hall*, 255.

2. Not bound to account. *Wilcox v. Wilcox*, 127.

3. Married woman tenant in common of property occupied by her and her husband—husband not bound to account. *Id.*

TENDER. See **DEBTOR AND CREDITOR**, II.; **CONTRACT**, 8; **VENDOR**, 7.

TEXAS.

Citizen of United States who was alien in Texas became citizen of Texas on admission of that state. *Osterman v. Baldwin*, 317.

THREATENING LETTER.

In action for writing, the loss or inconvenience sustained must be direct result of the letter, and be more than mental suffering. *Taft v. Taft*, 636.

TIDE WATERS. See **CONSTITUTIONAL LAW**, 3.

1. Old division line between lands to prevail. *Stockham v. Browning*, 767.

2. Rights of riparian owners. *Id.*

3. No rule established in N. J. to determine the line by which shore in front of coterminous shore owners shall be divided between them. *Id.*

TIMBER. See **DEED**, 12; **HUSBAND AND WIFE**, 11, 18; **RAILROAD**, 23; **VENDOR**, 13.

TITLE. See **ARBITRATION**, 4; **DEED**, I.; **EQUITY**, 6; **ESTATE TAIL**; **FRAUDS**, **STATUTE OF**, 1; **VENDOR**, 10, 23.

TOWN. See **HIGHWAY**; **MUNICIPAL CORPORATION**.

TRADE-MARK.

Infringement should be enjoined where the defence is the fraud or imposition of plaintiff, and the evidence is conflicting, but if the imposition is flagrant the court should suggest this defence. *Smith v. Woodruff*, 191.

TRESPASS. See **VENDOR**, 6.

1. Will not in general be restrained by injunction, but may be if amounts to nuisance. *Morris Canal Co. v. Fagan*, 700.

2. If declaration sets out matter so that it may be construed as a distinct injury, or as aggravation only, defendant may treat it as the latter, and plaintiff, if not so intending it, must reassign. *Grout v. Knapp*, 702.

3. For entering of cattle, if defendant does not allege defective fence plaintiff not bound to prove it in good order. *Sorenberger v. Houghton*, 703.

TRIAL. See **BANKRUPTCY**, 76-79; **EVIDENCE**, 2.

TROVER. See **ASSUMPSIT**, 4; **TENANT IN COMMON**, 1.

1. Sale of another's property under belief of ownership is conversion. *Morrill v. Moulton*, 639.

2. May be maintained by officer against receiptor for goods attached on *mesne* process. *Holt v. Burbank*, 318.

TROVER.

3. Special plea denying conversion amounts to general issue. *Turner v. Waldo*, 576.

4. Lessor and lessee owned stock on farm jointly, to be divided at end of lease. Lessee dying, his administrator has no more right to sell the stock than lessee himself had, and if he does so, lessor may recover in trover the value of his interest. *Id.*

TRUST AND TRUSTEE. See EXECUTOR, 6; GUARDIAN, 2; HUSBAND AND WIFE, 17; VENDOR, 12.

1. Attachment of funds in his hands as trustee. *Groome v. Lewis*, 255.

2. Statute of Frauds not a defence in case of resulting trust. *Brannin v. Brannin*, 698.

3. Party promising to bid at sale for another who stays away, relying on the promise, will be held a trustee if he buys for his own benefit, notwithstanding the Statute of Frauds. *Id.*

4. Contributions to a fund for a specific purpose are in hands of trustee only for that purpose, and surplus cannot be used for any other without consent of every contributor. *Abels v. McKeen*, 767.

5. Trustee who has abused his trust not entitled to commissions, but may be allowed compensation for special services. *Moore v. Zabriskie*, 767.

UNITED STATES NOTES. See COIN.

UNSEATED LAND. See TAXATION, 1.

USAGE. See CUSTOM.

USURY.

Mode of pleading. *Bank v. Orenth*, 127.

VENDOR AND PURCHASER. See FRAUDS, STATUTE OF; SALE.

1. Of Real Estate.

1. Where a vendor of real estate on default in the terms of payment by vendee, goes into a court of equity and has the contract declared void and of no effect, and is remitted to his original title and possession, this is not a proceeding in rescission, but in affirmance of the contract, and does not entitle the vendee to recover back the part of the purchase-money already paid. *Hansbrough et al. v. Peck*, 74.

2. A purchaser of real estate, who has paid part of his purchase-money or done an act in part performance of his agreement and then refuses to complete his contract, the vendor being willing to do his part, will not be permitted to recover back what has been thus advanced or done. *Id.*

3. Where a parol promise is substantially the same as a previous written one, and nothing is done under the latter which the promisor was not already bound to do under the former, no new consideration passing between the parties, the existence or enforcement of the parol contract cannot be set up as a rescission of the former written one. *Id.*

4. A purchaser after payment of part of the purchase-money, intended to abandon the contract, and the vendor promised, if he would pay up arrears, to indulge him for a certain time. The purchaser paid up the arrears, but the vendor enforced his contract within the time (as alleged) that he promised to forbear. *Held*, that there was no consideration for the promise, the purchaser having done nothing he was not already bound to do by his original contract. *Id.*

5. Vendor being able to convey only part of the land agreed upon, vendee may compel specific performance as to that part. *Covell v. Moseley*, 191.

6. Vendee entering under contract to purchase and failing to fulfil it, may be treated as a trespasser or tenant at will. *Woodbury v. Woodbury*, 318.

7. If vendor unable to perform his agreement at time, purchaser need not tender performance of his part. *Karker v. Haverly*, 639.

8. Waiver by acts of purchaser. *Id.*

VENDOR AND PURCHASER.

9. Damages for breach of agreement to reconvey. *Lawrence v. Chase* 441.

10. Agreement to sell land authorizing purchaser to take immediate possession passes equitable title at once, and destruction of building by fire after such contract, is no defence to action for purchase-money. *McKechine v. Sterling*, 128.

11. The expression "more or less" in describing quantity of land is notice to the purchaser that quantity is not of the essence of the contract. *Slothower v. Gordon*, 251.

12. Sales by trustees stand upon the same rules as to representations, and the rule *caveat emptor*, as other sales. *Id.*

13. Construction of contract for sale of standing timber with stipulation of vendee to cut and carry away. *Murphy v. Garland*, 318.

14. Simple representation of value not a warranty. *French v. Griffin*, 703.

II. Of Chattels.

15. Where the consignee of the cargo of a vessel at sea, sells the cargo and delivers the bill of lading, properly endorsed, to the purchaser, the sale is valid and passes the complete title to the goods. *Audenreid v. Randall*, 659.

16. Delivery of the bill of lading is, under the circumstances, a sufficient delivery of the goods to take the case out of the operation of the Statute of Frauds. *Id.*

17. If the purchaser afterwards refuse to accept the goods, vendor may sell them and recover the loss from the purchaser. *Id.*

18. On the 16th of March, at Boston, A. sold to B. a cargo of coal then at sea, and delivered to B., properly indorsed, a bill of lading, dated March 13th, at Philadelphia, and also a bill of sale of the coal, dated also March 13th, though the evidence showed that it was in fact made on the 16th, and was part of the transaction at Boston on that day. Before the arrival of the coal, B. offered A. one dollar a ton to take it off his hands, which A. refused. On the arrival of the coal, B. refused to receive it, and claimed that the contract was within the Statute of Frauds and void. After some correspondence, A. sold the coal at public auction, and brought suit for his loss in the transaction. *Held*, that he was entitled to recover. *Id.*

19. It is a well-settled rule in the law of sales of personal property that when anything remains to be done as between buyer and seller there is no delivery so as to cut off the right of stoppage *in transitu*. It is not necessary that the act remaining to be done should determine the quantity or the quality of the goods sold, but it may be any act whatsoever, within the contemplation of the parties to the contract. *Gill v. Pavenstedt*, 672.

20. A. purchased goods warehoused in a bonded warehouse from the importer, B., in whose name they were entered. The goods were bought on a credit at a specified price, and the duties were to be paid by A. as a part of the price. He had withdrawn by permission of B., parcels of the goods at different times, paying the duties on such parcels. Before the credit expired B. gave to A. an order on the bonded warehouseman to transfer the residue of the goods to A.'s name, which was done accordingly. As between the parties and the government, the goods still remained in B.'s name. They could only be withdrawn under the regulations of the treasury department, by a "withdrawal entry," signed by B. or by some one authorized by him in writing. While the goods were in this condition the purchaser, A., became insolvent. He demanded that B. should sign the necessary withdrawal entry, which the latter refused to do, except upon full payment of the price.

Held, that an act remained to be done as between buyer and seller of such a nature that there was no delivery either actual or constructive, and that B. had a right of detention of the goods for the unpaid purchase-money.

Held, further, that an action in equity would not lie to compel B. to sign the requisite withdrawal entry, since there was no trust created by the transaction, in the absence of payment or its equivalent. *Id.*

21. Statute of Vt. having taken away right of action for recovery or pos-

VENDOR AND PURCHASER.

session of intoxicating liquors sold contrary to law, right of stoppage *in transitu* cannot be enforced by suit. *Howe v. Stewart*, 638.

22. Receipt of goods by insolvent with design not to pay for them will avoid the sale though he had no such design when he ordered them. *Pike v. Wieting*, 574.

23. Party not the real owner of goods can only sell so as to pass title in exceptional cases where he has possession and the *indicia* of ownership. *Spalding v. Brewster*, 640.

VERDICT. See **NEW TRIAL.**

1. A sealed special verdict so expressed as to be ambiguous may be reformed and moulded by the court in presence of the jury, without sending the jury out to reconsider it. *Haycock v. Greup*, 529.

2. If not decisive of the real issue will be set aside. *Burwell v. Greathead*, 380.

3. Jury have no power to award costs, but this part of their verdict may be treated as surplusage. *Tucker v. Cochran*, 254.

4. Verdict which does not find the issue raised in the pleadings but enables the court to do so will be moulded into proper form. *Id.*

VESSEL. See **ADMIRALTY**, 4-7; **SHIPPING**.**VOTER AND VOTING.** See **CONSTITUTIONAL LAW**, 1, 9; **ELECTION**.**WAR.** See **INTERNATIONAL LAW**, 1.**WAREHOUSE.** See **CRIMINAL LAW**, 11; **FRAUDS**, **STATUTE OF**, 2; **VENDOR**, 20.**WARRANT.** See **CRIMINAL LAW**, 6, 7; **MANDAMUS**, 3.**WARRANTY.** See **VENDOR**, 14; **WAY**, 3.**WASTE.** See **HUSBAND AND WIFE**, 11, 18.**WATERS AND WATERCOURSE.** See **HIGHWAY**, 6; **RIVER**.**WAY.** See **EASEMENT**, 10.

1. Plaintiff having recovered for an obstruction to his way, agreed defendant might keep it up for \$30 per annum. This is a license determinable at the end of any year. *Gilmore v. Wilson*, 128.

2. Farm conveyed with right of free and uninterrupted passing over other land of grantor, the way being then used with gates and bars, must so continue. *Garland v. Turber*, 256.

3. Outstanding right of way is breach of warranty. *Russ v. Steele*, 703.

WHARF. See **RIVER**, 3-7.**WILL.** See **APPRENTICE**, 3; **INTEREST**, 1; **LUNATIC**; **SUNDAY**, 2.

1. Will made by lunatic with lucid intervals, being in dispute, evidence may be given of his instructions to draw a different will shortly before he was found lunatic. *Tilow v. Tilow*, 319.

2. Legatee under a will immediately preceding that in contest is competent witness against the latter. *Id.*

3. Opinions of subscribing witness. *Id.*

4. Will legally made, but destroyed by testator through fraud and undue influence, may be established as still in force. *Voorhis v. Voorhis*, 640.

5. Infant cannot make valid soldier's will. *Goodell v. Pike*, 703.

6. Court being satisfied of wilful withholding of facts from it may revoke probate. *Id.*

7. Devise with power of testamentary disposition but devise over in case of death of first devisee intestate and without issue. *Freeborn v. Wagner*, 512.

8. Publication in N. Y. *Abbey v. Christy*, 512.

WILL.

9. Condition in devise. Rules to determine whether a strict condition or not. *Stanley v. Colt*, 57.

10. If any part may take effect will may be proved, though part of it be void. *George v. George*, 319.

WIRT, WILLIAM, 65.

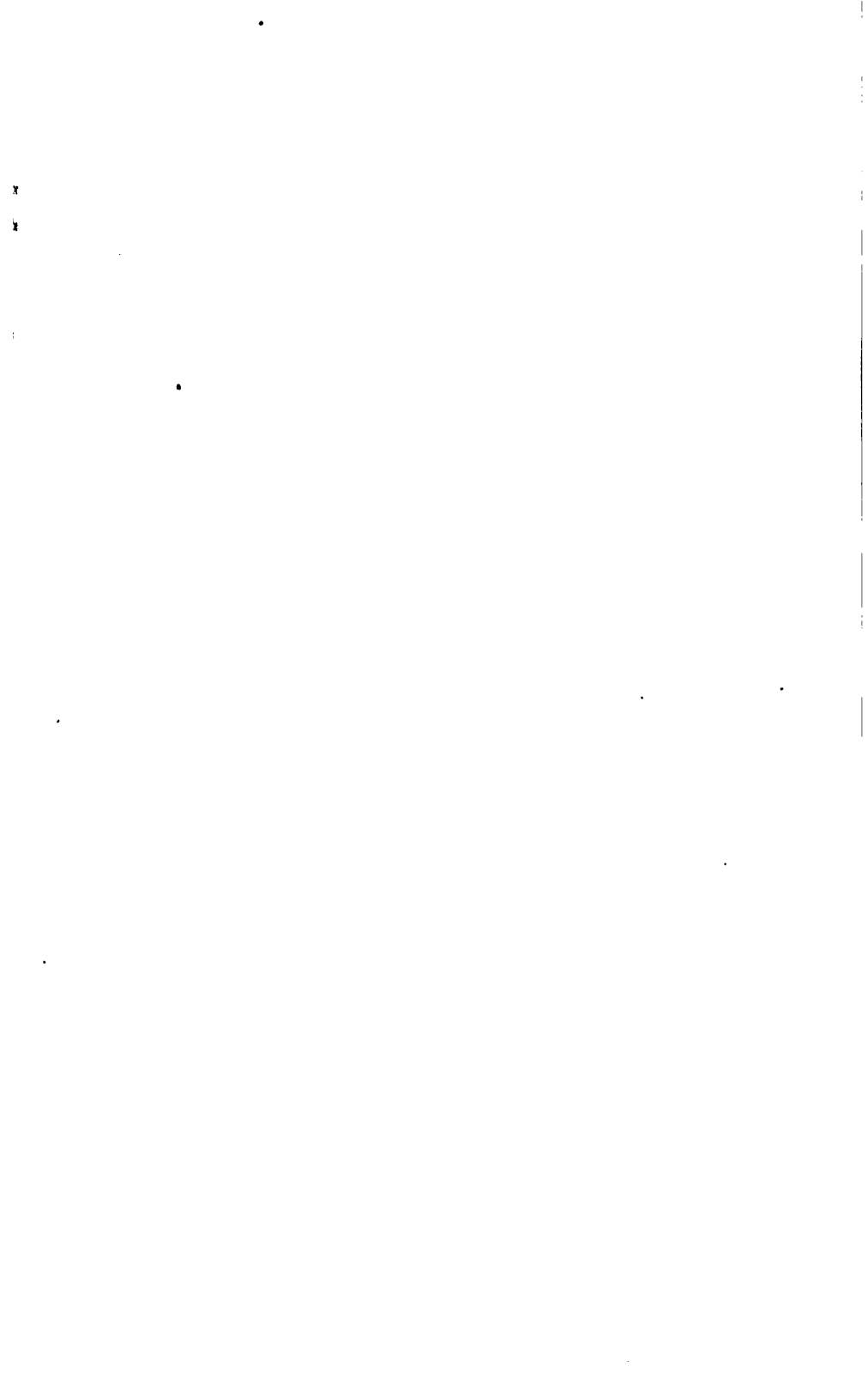
WITHDRAWAL ENTRY. See **VENDOR**, 20.

WITNESS. See **AGENT**, 5; **CRIMINAL LAW**, 10; **EVIDENCE**, 5; **HUSBAND AND WIFE**, 32; **WILL**, 2, 3.

1. When party may contradict his own witness. *People v. Skeeham*, 320.

2. Competency when offered is the test of admissibility. If plaintiff is examined and defendant dies afterwards but before hearing, plaintiff's evidence is admissible. *Marlatt v. Warwick*, 768.

END OF VOL. XVI.



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